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APPENDIX A

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA (22)

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

FLA. BAR NOS.: 068445
142163

Plaintiffs,

v.

DRAFT-1

RJ REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC., PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. and TOBACCO INSTITUTE, INC.,

Defendants.

_____/

FLORIDA CLASS PROPOSED VERDICT FORM FOR PHASE I

We, the Jury, return the following Verdict:

[Generic Causation]

1. Does smoking cigarettes cause one or more of the following diseases or medical conditions, in some smokers and former smokers?

Lung cancer Yes _____ No _____

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Emphysema	Yes ____	No ____
Chronic obstructive pulmonary disease [including lung disease, chronic bronchitis and diminished lung capacity]	Yes ____	No ____
Cancer of the larynx/voice box [head and neck cancer]	Yes ____	No ____
Cancer of the oral cavity/tongue [cancer of the mouth]	Yes ____	No ____
Heart disease [including cardiovascular disease, coronary heart disease, hardening of the arteries, atherosclerosis, coronary artery disease and arteriosclerosis, angina, abnormal blood clotting, blood vessel damage, heart attack, myocardial infarction]	Yes ____	No ____
Complications in pregnancy [including miscarriage]	Yes ____	No ____
Esophageal cancer	Yes ____	No ____
Bladder cancer [urinary bladder]	Yes ____	No ____
Pancreatic cancer	Yes ____	No ____
Kidney cancer [renal cancer]	Yes ____	No ____
Throat cancer	Yes ____	No ____
Stomach cancer	Yes ____	No ____
Pharyngeal cancer	Yes ____	No ____
Cervical cancer	Yes ____	No ____
Buerger's disease [including circulation problems and peripheral vascular disease]	Yes ____	No ____
Aortic aneurysm	Yes ____	No ____
Stroke [cerebrovascular disease, brain damage]	Yes ____	No ____

Asthma conditions related to chronic obstructive pulmonary disease	Yes _____	No _____
Infertility	Yes _____	No _____
Pulmonary disease	Yes _____	No _____

If your answer to all of the diseases, above, is "no", your verdict is for the Defendants, and you should not proceed further except to date and sign this verdict form. If you answered "yes" to one or more of the above diseases or medical conditions, please answer all of the remaining questions on this verdict form.

[Addiction/Dependence]

2. Are cigarettes that contain nicotine addictive or dependence producing in some smokers?

Yes _____ No _____

[Strict Liability]

3 Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective/unreasonably dangerous and a legal cause of loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[*Fraud and Misrepresentation*]

4. Did one or more of the Defendants make a false statement concerning a material fact, or conceal a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers and members of the public?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Civil Conspiracy]

5. Did two or more of the Tobacco Companies enter into an agreement to conceal, suppress or misrepresent information regarding the health effects of cigarette smoking, or the addictiveness of smoking, with the intention that smokers and members of the public rely to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____

Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Negligence]

6. Are one or more of the Defendants negligent and was said negligence a legal cause of damage, injury or death to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Intentional Infliction of Emotional Distress]

7. Did one or more of the Defendants engage in extreme and outrageous conduct with the intent to cause severe emotional distress or with reckless disregard of the high probability of causing severe emotional distress to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____

Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Breach of Express Warranty]

8. Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that did not conform to representations of fact made by said Defendant(s), either orally or in writing, on which some smokers, relied to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Breach of Implied Warranty]

9. Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended, causing loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each of the Defendants, below:

Philip Morris, Incorporated	Yes _____	No _____

RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Entitlement to Punitive Damages]

10. Under the circumstances of this case, state below whether punitive damages are warranted against:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

SO SAY WE ALL, this ___ day of _____, 1999.

_____
FOREPERSON

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA (22)

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

FLA. BAR NOS.: 068445
142163

Plaintiffs,

DRAFT-2

v.

RJ REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC., PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. and TOBACCO INSTITUTE, INC.,

Defendants.

_____/

FLORIDA CLASS PROPOSED VERDICT FORM FOR PHASE I

We, the Jury, return the following Verdict:

[Generic Causation]

1. Does smoking cigarettes cause one or more of the following diseases or medical conditions, in some smokers and former smokers?

Lung cancer Yes _____ No _____

Emphysema	Yes _____	No _____
Chronic obstructive pulmonary disease	Yes _____	No _____
Cancer of the larynx/voice box	Yes _____	No _____
Cancer of the oral cavity/tongue	Yes _____	No _____
Heart disease	Yes _____	No _____
Complications in pregnancy	Yes _____	No _____
Esophageal cancer	Yes _____	No _____
Bladder cancer	Yes _____	No _____
Pancreatic cancer	Yes _____	No _____
Kidney cancer	Yes _____	No _____
Throat cancer	Yes _____	No _____
Stomach cancer	Yes _____	No _____
Pharyngeal cancer	Yes _____	No _____
Cervical cancer	Yes _____	No _____
Buerger's disease	Yes _____	No _____
Aortic aneurysm	Yes _____	No _____
Stroke	Yes _____	No _____
Asthma	Yes _____	No _____
Infertility	Yes _____	No _____
Pulmonary disease	Yes _____	No _____

If your answer to all of the diseases, above, is "no", your verdict is for the Defendants, and you should not proceed further except to date and sign this verdict form. If you answered "yes" to one or more of the above diseases or medical conditions, please answer all of the remaining questions on this verdict form.

[Addiction/Dependence]

2. Are cigarettes that contain nicotine addictive or dependence producing in some smokers?

Yes _____ No _____

[Strict Liability]

3. Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective/unreasonably dangerous and a legal cause of loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[*Fraud and Misrepresentation*]

4. Did one or more of the Defendants make a false statement concerning a material fact, or conceal a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers and members of the public?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____

Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Civil Conspiracy]

5. Did two or more of the Tobacco Companies enter into an agreement to conceal, suppress or misrepresent information regarding the health effects of cigarette smoking, or the addictiveness of smoking, with the intention that smokers and members of the public rely to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Negligence]

6. Are one or more of the Defendants negligent and was said negligence a legal cause of damage, injury or death to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Intentional Infliction of Emotional Distress]

7. Did one or more of the Defendants engage in extreme and outrageous conduct with the intent to cause severe emotional distress or with reckless disregard of the high probability of causing severe emotional distress to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Breach of Express Warranty]

8. Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that did not conform to representations of fact made by said Defendant(s), either orally or in writing, on which some smokers, relied to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Breach of Implied Warranty]

9. Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended, causing loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each of the Defendants, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Entitlement to Punitive Damages]

10. Under the circumstances of this case, state below whether punitive damages are warranted against:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

SO SAY WE ALL, this ___ day of _____, 1999.

_____
FOREPERSON

APPENDIX B

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
Case No. 94-08273 CA (22)

HOWARD A. ENGLE, M.D., et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, et al.,

Defendants.

CERTAIN DEFENDANTS' PRELIMINARY DRAFT[1]

PHASE I TRIAL VERDICT FORM

The Court has instructed the jury on the law. Based on the those instructions and the evidence in the case, please answer the following questions.

[1] This preliminary draft form is submitted on behalf of all Defendants except Brown & Williamson Tobacco Corporation (for itself and for the defendant named as The American Tobacco Company), Liggett Group, Inc., and Brooke Group, Ltd., Inc.

Question No. 1. Have plaintiffs proven that cigarette smoking causes any of the following diseases in some smokers?

Aortic Aneurysm	Yes _____	No _____
Bladder Cancer	Yes _____	No _____
Cerebrovascular Disease	Yes _____	No _____
Cervical Cancer	Yes _____	No _____
Chronic Obstructive Pulmonary Disease	Yes _____	No _____
Coronary Heart Disease	Yes _____	No _____
Esophageal Cancer	Yes _____	No _____
Infertility	Yes _____	No _____
Kidney Cancer	Yes _____	No _____
Laryngeal Cancer	Yes _____	No _____
Leukemia	Yes _____	No _____
Lung Cancer		
Adenocarcinoma	Yes _____	No _____
Bronchioloalveolar carcinoma	Yes _____	No _____
Large cell carcinom	Yes _____	No _____
Small cell carcinoma	Yes _____	No _____
Squamous cell carcinoma	Yes _____	No _____
Miscarriage	Yes _____	No _____
Oral Cavity/Tongue Cancer	Yes _____	No _____
Pancreatic Cancer	Yes _____	No _____
Peripheral Vascular Disease	Yes _____	No _____
Pharyngeal Cancer	Yes _____	No _____
Stomach Cancer	Yes _____	No _____
Ulcers	Yes _____	No _____

If your answer to Question No. 1 is "No" as to all diseases, stop now, sign the verdict form, and inform the bailiff that you have reached a verdict. If your answer to Question No. 1 is "Yes" as to any disease, answer Question No. 2a.

Question No. 2a. Have plaintiffs proven that there was a technologically and commercially feasible alternative design for cigarettes, that was not made available to smokers, and that plaintiffs have proven would have prevented the types of diseases for which you checked "yes" in Question No. 1?

Yes _____ No _____

If your answer to Question No. 2a is "No," skip Question Nos. 2b, 3a and 3b, and go directly to Question No. 4a. If your answer to Question No. 2a is "Yes," answer Question No. 2b.

Question No. 2b. If you answered "Yes" to Question No. 2a, identify the periods of time during which plaintiffs have proven that there existed a technologically and commercially feasible alternative design for cigarettes that was not made available, and that would have prevented the types of diseases for which you checked "Yes" in Question No. 1, and identify the technologically and commercially feasible alternative design.

Periods of Time	Alternative Design
_____	_____
_____	_____

Question No. 3a. Have plaintiffs proven that any of the cigarettes manufactured by any defendant after July 1, 1974, was defective and unreasonably dangerous?

Yes _____ No _____

If your answer to Question No. 3a is "No," skip Question No. 3b, and go directly to Question No. 4a. If your answer to Question No. 3a is "Yes," answer Question No. 3b.

Question No. 3b. If you answered "Yes" to Question No. 3a, identify the specific defect(s) that plaintiffs have proven by identifying the defendant(s), the specific product(s) (brand and brand style) you find to be defective and unreasonably dangerous, the periods of time during which the product was defective and unreasonably dangerous, and the specific defect of the product, if any:

Defendant	Product (Brand & Brand Style)	Defect	Period of Time
_____	_____	_____	_____
_____	_____	_____	_____

Question No. 4a. Have plaintiffs proven that any defendant intentionally published a false statement of material fact in the State of Florida after May 4, 1982, knowing that the statement was false when published?

Yes _____ No _____

If your answer to Question No. 4a is "No," skip Question Nos. 4b, 5a and 5b, and go directly to Question No. 6a. If your answer to Question No. 4a is "Yes," answer Question No. 4b.

Question No. 4b. If your answer to Question No. 4a is "Yes," identify each false statement of material fact that plaintiffs have proven was published in the State of Florida after May 4, 1982, by listing the defendant that published the statement, the statement itself, the date the statement was published, and how the statement was published.

Defendant	False Statement Published in Florida	Date of Statement	Form of Publication
_____	_____	_____	_____
_____	_____	_____	_____

Question No. 5a. With respect to any false statement of material fact identified in response to Question No. 4b above, have plaintiffs proven that two or more of the defendants entered into a conspiracy to intentionally make that statement, knowing that the statement was false when made?

Yes _____ No _____

If your answer to Question No. 5a is "No," skip Question No. 5b and go directly to Question No. 6a. If your answer to Question No. 5a is "Yes," answer Question No. 5b.

Question No. 5b. If your answer to Question No. 5a is "Yes," identify which defendants plaintiffs have proven entered into such a conspiracy, when any such conspiracy was made, and the false statement of material fact that the identified defendants conspired to make.

Defendants Who Conspired	False Statement That Defendants Conspired To Make	Period of Time of Conspiracy
_____	_____	_____
_____	_____	_____

Question No. 6a. Have plaintiffs proven that any defendant did not exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?

Yes _____ No _____

If your answer to Question No. 6a is "No," skip Question No. 6b, sign the verdict form and inform the bailiff that you have reached a verdict. If your answer to Question No. 6a is "Yes," answer Question No. 6b.

Question No. 6b. If your answer to Question No. 6a is "Yes," identify each defendant that plaintiffs have proven did not exercise a reasonable degree of care, the act by that defendant demonstrating the lack of that degree of care, the product (brand & brand style) that was the subject of that act, and the date upon which each act was committed.

Defendant	Product (Brand & Brand Style)	Act	Date of Act
_____	_____	_____	_____
_____	_____	_____	_____

Dated _____

_____
Foreperson

APPENDIX C

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
Case No. 94-08273 CA (22)

HOWARD A. ENGLE, M.D., et al.,:
:
Plaintiffs,:
:
vs. :
:
R.J. REYNOLDS TOBACCO COMPANY,:
et al., :
:
Defendants.:

THE ORIGINAL FILED
ON JUN 14 1999
IN THE OFFICE OF
CIRCUIT COURT DADE CO. FL

OUTLINE OF PLAINTIFFS' PROPOSED PHASE I VERDICT FORM QUESTIONS AND CERTAIN DEFENDANTS' OBJECTIONS AND COUNTER-PROPOSALS THERETO[1]

For the Court's convenience, Certain Defendants[2] ("Defendants") have prepared this outline of Plaintiffs' proposed Phase I jury verdict questions and Defendants' objections and counter-proposals thereto. Where appropriate, this outline also attempts to reflect the Court's comments and the parties' agreement at the June 10, 1999, hearing.

[1] This submission is made without waiver of any arguments by defendants orally or in writing in connection with evidentiary objections or motions for decertification, summary judgment, directed verdict or mistrial or at the hearings of June 10-11, 1999.

[2] This submission is filed on behalf of all Defendants except Liggett Group, Inc., and Brooke Group, Ltd., Inc. Defendants Brown & Williamson Tobacco Corporation and The American Tobacco Company join except that there are certain alternative questions or approaches that B&W/ATCo have proposed as noted herein and as noted at the hearing on June 10 and 11, 1999. The non-B&W/ATCo defendants do not join in the B&W/ATCo alternative questions and approaches.

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CASE NO. 94-08273 CA22

[Questions Relating to General Causation]

PLAINTIFFS' PROPOSAL[3]:

Does smoking cigarettes cause one or more of the following diseases or medical conditions, in some smokers and former smokers?

Lung cancer	**Yes_____**	**No_____**
Emphysema	**Yes_____**	**No_____**
Chronic obstructive pulmonary disease	**Yes_____**	**No_____**
Cancer of the larynx/voice box	**Yes_____**	**No_____**
Cancer of the oral cavity/tongue	**Yes_____**	**No_____**
Heart disease	**Yes_____**	**No_____**
Complications in pregnancy	**Yes_____**	**No_____**
Esophageal cancer	**Yes_____**	**No_____**
Bladder cancer	**Yes_____**	**No_____**
Pancreatic cancer	**Yes_____**	**No_____**
Kidney cancer	**Yes_____**	**No_____**
Throat cancer	**Yes_____**	**No_____**
Stomach cancer	**Yes_____**	**No_____**
Pharyngeal cancer	**Yes_____**	**No_____**
Cervical cancer	**Yes_____**	**No_____**
Buerger's disease	**Yes_____**	**No_____**
Aortic aneurysm	**Yes_____**	**No_____**
Stroke	**Yes_____**	**No_____**
Asthma	**Yes_____**	**No_____**
Infertility	**Yes_____**	**No_____**
Pulmonary disease	**Yes_____**	**No_____**

If your answer to all of the diseases, above, is "no", your verdict is for the Defendants, and you should not proceed further except to date and sign this verdict form. If you answered "yes" to one or more of the above diseases or medical conditions, please answer all of the remaining questions on this verdict form.

---

[3] Plaintiffs' proposal includes a bracketed heading for each question (e.g., "Negligence"). It appeared at the June 10, 1999, hearing that Plaintiffs are not requesting that such headings appear on the actual verdict form itself. See Tr. at 35883. In any event, Defendants object to Plaintiffs' headings as improper because Phase I deals not with complete causes of action, such as negligence, but only certain common questions relating to Plaintiffs' claims.

DEFENDANTS' OBJECTIONS:

- The order of the diseases and medical conditions is arbitrary, confusing and potentially prejudicial because it may lead the jury to speculate as to whether there is any significance to the order of the list; alphabetical order is appropriate.

- The reference to "former smokers" is improper and confusing.

- "Lung Cancer" should be broken down into the five different lung cell type cancers still at issue in the case (adenocarcinoma, bronchioloalveolar, large cell, small cell and squamous cell) to comport with the undisputed evidence that they are different diseases with different risk factors and different statistical associations with smoking. (Defendants' motion for directed verdict on bronchioloalveolar carcinoma is pending.)

- Reference to "Heart Disease" is improper and confusing because there are numerous different diseases of the heart and the Court has directed a verdict for Defendants with respect to several of them. The particular disease for which there is evidence of an association with smoking is "Coronary Heart Disease", which is related to Artherosclerosis.

- Reference to "Pulmonary Disease" is duplicative and confusing because there is no such disease separate from diseases such as lung cancer and COPD, which are also listed.

- Reference to "Emphysema" is duplicative and confusing because Emphysema is part of Chronic Obstructive Pulmonary Disease, which is also listed; it should be included as a form of COPD.

- Reference to "Complications in Pregnancy" is improper because the only such condition for which there is any evidence in the record is Miscarriage, which is also listed. (The Court has directed a verdict in favor of Defendants on intrauterine growth retardation (low birth weight).)

- Reference to "Throat Cancer" is duplicative and confusing because it necessarily relates to Esophageal Cancer or Laryngeal Cancer, which are also listed; if

"Throat Cancer" is listed at all, it should be as an alternative term for those other diseases.

- Reference to "Buerger's Disease" is duplicative and confusing because it is a form of Peripheral Vascular Disease; if Buerger's Disease is listed at all, it should be listed as a form of Peripheral Vascular Disease.

- Reference to "Stroke" is improper because Stroke is a symptom of Cerebral Vascular Disease; if Stroke is listed at all, it should be listed with Cerebral Vascular Disease.

- Inclusion of Asthma is improper because the Court has already directed a verdict in favor of Defendants on Asthma except with respect to "asthmatic conditions related to COPD". However, including "asthmatic conditions related to COPD" would be improper because the only other asthmatic condition mentioned in the trial was asthmatic bronchitis and the testimony did not identify smoking as a cause of that condition. In any event, if "asthmatic conditions related to COPD" are to be included at all, they should be subsumed into COPD.

- Inclusion of the following diseases is improper because there is insufficient evidence to support Plaintiffs' claims with respect to them: Stomach Cancer, Cervical Cancer, Kidney Cancer and Bronchioloalveolar Cancer (a form of lung cancer); Defendants' motion for directed verdict on these diseases is currently pending.

DEFENDANTS' PROPOSAL (as modified to reflect agreement of the parties and statements of the Court on June 10, 1999):

Have plaintiffs proven that cigarette smoking causes any of the following diseases in some smokers?

Aortic Aneurysm	**Yes** _____	**No** _____
Bladder Cancer	**Yes** _____	**No** _____
Cerebrovascular Disease (including Stroke)	**Yes** _____	**No** _____
Cervical Cancer	**Yes** _____	**No** _____
Chronic Obstructive Pulmonary Disease (including emphysema)	**Yes** _____	**No** _____
Coronary Heart Disease	**Yes** _____	**No** _____
Esophageal (Throat) Cancer	**Yes** _____	**No** _____

Infertility	**Yes _____**	**No _____**
Kidney Cancer	**Yes _____**	**No _____**
Laryngeal (Throat or Voice Box) Cancer	**Yes _____**	**No _____**
Lung Cancer		
Adenocarcinoma	**Yes _____**	**No _____**
Bronchioloalveolar carcinoma	**Yes _____**	**No _____**
Large cell carcinoma	**Yes _____**	**No _____**
Small cell carcinoma	**Yes _____**	**No _____**
Squamous cell carcinoma	**Yes _____**	**No _____**
Miscarriage	**Yes _____**	**No _____**
Oral Cavity/Tongue Cancer	**Yes _____**	**No _____**
Pancreatic Cancer	**Yes _____**	**No _____**
Peripheral Vascular Disease (including Buerger's Disease)	**Yes _____**	**No _____**
Pharyngeal Cancer	**Yes _____**	**No _____**
Stomach Cancer	**Yes _____**	**No _____**

If your answer to this question is "No" as to all diseases, stop now, sign the verdict form, and inform the bailiff that you have reached a verdict. If your answer to this question is "Yes" as to any disease, answer the following questions.

(N.B. If Defendants' pending motions for directed verdict on Cervical Cancer, Broncioloalveolar Carcinoma, Kidney Cancer and Stomach Cancer are granted, those diseases would be removed from the list.)

B&W/ATCo PROPOSAL

- There should be no causation question at all for the reasons stated on June 10, 1999.
- If there is to be a causation question, it should read as follows:

  Has it been proven that cigarette smoking causes one or more of the following diseases?

- There should be no reference to "in some smokers".
- If there is to be a causation question, B&W/ATCo join in Defendants' list of diseases.

- If there is to be a causation question, it should be accompanied by a second question, which follows the first and reads as follows:

  Have plaintiffs proven that defendants' statements on causation prevented Florida smokers from being aware of the risks of smoking?

  Yes _____ No _____

- B&W/ATCo join in all objections.

[Questions Relating to Addiction]

PLAINTIFFS' PROPOSAL:

Are cigarettes that contain nicotine addictive or dependence producing in some smokers?

Yes ____ No ____

DEFENDANTS' OBJECTIONS:

- This question is not appropriate for Phase I because, according to the testimony of both Plaintiffs' and Defendants' witnesses, addiction is an individualized issue.

- The term "addictive" is vague, ambiguous and confusing; the testimony at trial by both Plaintiffs' and Defendants' expert witnesses was that the term means different things to different people at different times; the jury would not know what was being asked.

- Reference to "dependence producing" is improper. The class is defined by "addiction", the term chosen by Plaintiffs and used for purposes of certification and notice to the class. The testimony at trial by Plaintiffs' witnesses and Defendants' witnesses was that "addiction" and "dependence" do not necessarily mean the same thing. In addition, the evidence showed that "dependence" incorporates the notion of "habit". If the Court includes "dependence producing" here, then it should also include "habit-forming".

- Given the ambiguity of "addiction", the question is meaningless and does not go to the elements of any claim by Plaintiffs. The proper "addiction"-related inquiry, if any, is whether smokers can quit or not. (See follow-up question in Defendants' Backup Proposal, below.)

DEFENDANTS' PRIMARY PROPOSAL:

[No question on addiction.]

DEFENDANTS' BACKUP PROPOSAL:

If the Court decides, over Defendants' objection, to ask the jury any addiction question(s) at all, Defendants propose the following:

Have plaintiffs proven that nicotine causes some smokers to become addicted to cigarettes?

Yes _____ No _____

If your answer to this question is "No", stop now, sign the verdict form and inform the bailiff that you have reached a verdict. If your answer to this question is "Yes", answer the following question.

Have plaintiffs proven that addicted smokers are not able to quit?

Yes _____ No _____

B&W/ATCo BACKUP PROPOSAL

- There should be no question on addiction for the reasons noted above. B&W/ATCo joins in the objections.
- B&W/ATCo proposes that, if there is to be a question, it should read as follows:

Have plaintiffs proven that smokers are unable to quit smoking because of their addiction to nicotine?

Yes _____ No _____

CASE NO. 94-08273 CA22

[Questions Relating to Claim for Strict Liability]

PLAINTIFFS' PROPOSAL:

Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective/unreasonably dangerous and a legal cause of loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	**Yes____**	**No____**
RJ Reynolds Tobacco Company	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes____**	**No____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes____**	**No____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes____**	**No____**

DEFENDANTS' OBJECTIONS:

- The term "defective/unreasonably dangerous" is vague, confusing and improper; it may suggest to the jury that "defect" and "unreasonable danger" are alternatives. The proper term under Florida law is "defective and unreasonably dangerous".

- The tag line "and a legal cause . . . ." is improper because legal cause has not been tried and cannot be determined in Phase I; no evidence was presented in Phase I that would support submission of this issue to the jury.

- The question fails to ask for specifics (defect, time period, product), which renders it useless for application to individual plaintiffs in this case.

- The question fails to specify the time limitation imposed by the statute of repose for products liability claims (i.e., claim limited to post-July 1, 1974).

- The question fails to ask about alternative design, which has been an element of Plaintiffs' strict

liability claim since they filed their complaint (see ¶85(f)(i)) and is potentially dispositive of their claim. If the alternative design question is answered in the negative, there is no need to ask the defect question.

DEFENDANTS' PROPOSAL:

Have plaintiffs proven that there was a technologically and commercially feasible alternative design for cigarettes, that was not made available to smokers, and that plaintiffs have proven would have prevented the types of diseases for which you checked "yes" in Question No. _____ [the general causation question]?

Yes _____ No _____

If your answer to the preceding question is "No," skip the following questions in this section. If your answer to the preceding question is "Yes," answer the following questions.

If you answered "Yes" to the preceding Question, identify the periods of time during which plaintiffs have proven that there existed a technologically and commercially feasible alternative design for cigarettes that was not made available, and that would have prevented the types of diseases for which you checked "Yes" in Question No. _____ [the general causation question] and identify the technologically and commercially feasible alternative design.

Periods of Time	Alternative Design
_____	_____
_____	_____

Have plaintiffs proven that any of the cigarettes manufactured by any defendant after July 1, 1974, was defective and unreasonably dangerous?

Yes _____ No _____

If your answer to the preceding question is "No," skip the following questions in this section. If your answer to the preceding question is "Yes," answer the following questions.

If you answered "Yes" to the preceding question, identify the specific defect(s) that plaintiffs have proven by identifying the defendant(s), the specific product(s) (brand and brand style) you find to be defective and unreasonably dangerous, the periods of time during which the product was defective and unreasonably dangerous, and the specific defect of the product, if any:

Defendant	Product (Brand & Brand Style)	Defect	Period of Time
_____	_____	_____	_____
_____	_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections and proposal, but submit that this group of questions should be headed "COUNT I". This type of heading will assit the jury in knowing that the questions relate to particular parts of claims made in the case on which the Court will instruct them. The Phase I trial, of course, cannot result in a judgment in favor of the Plaintiffs on any count.

- Whenever B&W and ATCo are referenced, they should be listed as:

Brown & Williamson Tobacco Corporation Yes ___ No ___
The American Tobacco Company Yes ___ No ___

[Questions Relating to Claim for Fraud and Misrepresentation]

PLAINTIFFS' PROPOSAL:

Did one or more of the Defendants make a false statement concerning a material fact, or conceal a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers and members of the public?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	**Yes_____**	**No_____**
RJ Reynolds Tobacco Company	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes_____**	**No_____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes_____**	**No_____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes_____**	**No_____**
Council for Tobacco Research-U.S.A.	**Yes_____**	**No_____**
Tobacco Institute	**Yes_____**	**No_____**

DEFENDANTS' OBJECTIONS:

- Reference to "a false statement concerning a material fact" is improper because a claim of fraud must be based on a false statement of material fact (e.g., a false statement of opinion about a material fact is not actionable).

- Reference to "conceal[ment]" is improper because there is no general duty to disclose under Florida law and because of federal preemption relating to disclosure of information about the health effects of smoking cigarettes.

- Reference to "misleading" statements is improper because the legal standard requires that the statement be false.

- Reference to "being without knowledge as to its truth or falsity" is improper because the legal standard

requires that the maker of the statement know that it is false or know that he is without knowledge as to its truth or falsity.

- Reference to an intention to "mislead" is improper because the legal standard requires an intention that the plaintiffs act to their detriment.

- Reference to the "public" is improper because the only relevant persons are the plaintiffs; the "public" is not a party claiming fraud in this case and Florida does not recognize a claim for fraud on the public.

- The question fails to specify the time limitation imposed by the statute of repose for fraud claims (i.e., claim limited to post-May 5, 1982).

- The question fails to specify that the false statement must have been published in Florida.

- The question fails to ask for specifics (defendant, statement, time, manner of publication), which renders it useless for application to individual plaintiffs in this case.

DEFENDANTS' PROPOSAL:

Have plaintiffs proven that any defendant intentionally published a false statement of material fact in the State of Florida after May 5, 1982, knowing that the statement was false when published?

Yes _____ No _____

If your answer to the question is "No," skip the remaining questions in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the preceding question is "Yes," identify each false statement of material fact that plaintiffs have proven was published in the State of Florida after May 5, 1982, by listing the defendant that published the statement, the statement itself, the date the statement was published, and how the statement was published.

Defendant	False Statement Published in Florida	Date of Statement	Form of Publication
_____	_____	_____	_____
_____	_____	_____	_____

B&W/ATCo PROPOSAL

- The first Defendants' question should be preceded by a question which reads:

  Have plaintiffs proven that defendants' statements on causation prevented Florida smokers from being aware of the risks of smoking?

  Yes _____ No _____

- These questions should be headed "COUNT II".

- B&W/ATCo otherwise concur in Defendants' objections and proposal.

CASE NO. 94-08273 CA22

[Questions Relating to Claim for Civil Conspiracy]

PLAINIFFS' PROPOSAL:

Did two or more of the Tobacco Companies enter into an agreement to conceal, suppress or misrepresent information regarding the health effects of cigarette smoking, or the addictiveness of smoking, with the intention that smokers and members of the public rely to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	**Yes_____**	**No_____**
RJ Reynolds Tobacco Company	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes_____**	**No_____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes_____**	**No_____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes_____**	**No_____**
Council for Tobacco Research-U.S.A.	**Yes_____**	**No_____**
Tobacco Institute	**Yes_____**	**No_____**

DEFENDANTS' OBJECTIONS:

- References to "conceal[ment]", "suppress[ion]" and "misrepresent[ation]" are improper because such conduct is not necessarily tortious and Plaintiffs' conspiracy claim requires that the alleged conspiracy be related to an underlying tort. Such references are also improper because of federal preemption relating to cigarettes.

- The reference to "the addictiveness of smoking" is improper because it assumes a fact in dispute.

- Reference to "members of the public" is improper because the public is not a party to this case; the only relevant persons for this purpose are the Plaintiffs.

- The question fails to ask for specifics (e.g., to which statements the alleged agreement relates), which

renders it useless for application to individual plaintiffs in this case.

DEFENDANTS' PROPOSAL:

With respect to any false statement of material fact identified in response to Question No. _____ [the question relating to fraud], have plaintiffs proven that two or more of the defendants entered into a conspiracy to intentionally make that statement, knowing that the statement was false when made?

Yes _____ No _____

If your answer to the preceding question is "No", skip the following question. If your answer to the preceding question is "Yes", answer the following question.

If your answer to the preceding question is "Yes", identify which defendants plaintiffs have proven entered into such a conspiracy, when any such conspiracy was made, and the false statement of material fact that the identified defendants conspired to make.

Defendants Who Conspired	False Statement That Defendants Conspired To Make	Period of Conspiracy
_____	_____	_____
_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concurs in Defendants' objections and proposal, except to state that this question should be headed "COUNT III".

CASE NO. 94-08273 CA22

[Questions Relating to Claim for Negligence]

PLAINTIFFS' PROPOSAL:

Are one or more of the Defendants negligent and was said negligence a legal cause of damage, injury or death to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	**Yes____**	**No____**
RJ Reynolds Tobacco Company	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes____**	**No____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes____**	**No____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes____**	**No____**

DEFENDANTS' OBJECTIONS:

- Reference to "negligence" is improper because the complete tort of negligence (including cause-in-fact and proximate cause) has not been tried and cannot be determined in Phase I. In this Phase of the case, the only negligence-related issue that can be determined is whether reasonable care was exercised.

- The tag line "and a legal cause . . . ." is improper because legal cause has not been tried and cannot be determined in Phase I; no evidence was presented in Phase I that would support submission of this issue to the jury.

- The question fails to ask for specifics (e.g., conduct), which renders it useless for application to individual plaintiffs in this case.

DEFENDANTS' PROPOSAL:

Have plaintiffs proven that any defendant did not exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?

Yes _____ No _____

If your answer to this question is "No," skip the next question. If your answer to this question is "Yes", answer the following question.

If your answer to the preceding question is "Yes", identify each defendant that plaintiffs have proven did not exercise a reasonable degree of care, the act by that defendant demonstrating the lack of that degree of care, the product (brand & brand style) that was the subject of that act, and the date upon which each act was committed.

Defendant	Product (Brand & Brand Style)	Act	Date of Act
_____	_____	_____	_____
_____	_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections and proposal, except to state that these questions should be headed "COUNT VI".

[Questions Relating to Claim for Intentional Infliction of Emotional Distress]

PLAINTIFFS' PROPOSAL:

Did one or more of the Defendants engage in extreme and outrageous conduct with the intent to cause severe emotional distress or with reckless disregard of the high probability of causing severe emotional distress to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	**Yes____**	**No____**
RJ Reynolds Tobacco Company	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes____**	**No____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes____**	**No____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes____**	**No____**
Council for Tobacco Research-U.S.A.	**Yes____**	**No____**
Tobacco Institute	**Yes____**	**No____**

DEFENDANTS' OBJECTIONS:

- This question should not appear on the verdict form because the claim is legally deficient. (Defendants' motion for directed verdict on this claim is currently pending.) Florida law permits this "gap-filler", non-traditional claim only where the plaintiff has no traditional claims available because they cannot allege the requisite physical injury or impact, and only suffered mental distress. Because all members of the putative class by definition can and must allege physical injury here, they must pursue their claims and damages, including any damages for emotional distress, through the traditional tort theories. Th eclaim of intentional infliction is not available.

- The question is also factually deficient because there is no evidence in the record to support a finding of intent to cause emotional distress.

- The question is improperly broad because it is not limited to the design of cigarettes, which has been the gravamen of Plaintiffs' claim for intentional infliction since they filed their complaint (see ¶131).

- Plaintiffs' proposed question fails to focus on Defendants' conduct in the design of cigarettes sold to particular persons, as required by Florida law.

- Intentional infliction of emotional distress claims are to be used when someone suffers and is intended to suffer emotional distress without physical injury as a result of conduct that goes beyond all possible bounds of decency and is regarded as shocking, atrocious, and utterly intolerable in a civilized society. Inclusion of such a question on this record would be legally inaccurate and highly prejudicial.

DEFENDANTS' PRIMARY PROPOSAL:

[No question on intentional infliction of emotional distress.]

DEFENDANTS' BACKUP PROPOSAL:

If the Court decides, over Defendants' objection, to ask any intentional infliction question(s) at all, Defendants propose the following:

Have plaintiffs proven that one or more of the defendants engaged in extreme and outrageous conduct in the design of cigarettes sold to Florida smokers with the intent to inflict severe emotional distress upon a particular Florida smoker?

Yes _____ No _____

If your answer to this question is "No," skip the next question. If your answer to this question is "Yes," answer the following question.

If your answer to the previous question is "Yes," identify such conduct, each defendant who engaged in such conduct and the period of time during which such conduct occurred.

Defendant	Conduct	Period of Time
_____	_____	_____
_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections and backup proposal, except to state that this question should be headed "COUNT V".

[Questions Relating to Claim for Breach of Express Warranty]

PLAINTIFFS' PROPOSAL:

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that did not conform to representations of fact made by said Defendant(s), either orally or in writing, on which some smokers, relied to their detriment?

Please answer "Yes" or "No" as to each Defendant, below.

Philip Morris, Incorporated	**Yes____**	**No____**
RJ Reynolds Tobacco Company	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes____**	**No____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes____**	**No____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes____**	**No____**

DEFENDANTS' OBJECTIONS:

- This question should not appear on the verdict form. (Defendants' motion for direct verdict on this claim on numerous grounds is currently pending.) Florida law does not recognize a cause of action for breach of express warranty against a manufacturer who is not in privity of contract with the plaintiff.

- In order for there to be privity of contract, there has to be a direct sale by a manufacturer to a cigarette consumer who makes a purchase. There is no evidence of that in the record. In addition, coupons, advertising, and gifts do not suffice to create privity of contract.

- Even if the Court does not find that there has been no proof of privity whatsoever, warranty claims turning on unique, individual claims of privity cannot be tried in Phase I.

- Reference to "reli[ance]" is improper because reliance has not been tried and cannot be determined in Phase I;

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no evidence has been presented in Phase I that would support submission of this issue to the jury. Sections 3A and 4A of the trial plan provide that reliance and other individual issues are to be determined in Phases II and III.

- Reference to "supply" is improper because Florida law requires a sale for a breach of express warranty claim.

- The question fails to state that the "representation of fact" must be in connection with a sale of cigarettes.

- The question fails to ask for specifics (e.g., the particular warranties and sales), which renders it useless for application to individual plaintiffs in this case.

DEFENDANTS' PRIMARY PROPOSAL:

[No question on express warranty.]

DEFENDANTS' BACKUP PROPOSAL:

If the Court decides, over Defendants' objection, to ask any express warranty question(s) at all, Defendants propose the following:

Have plaintiffs proven that any defendant sold any cigarettes directly to Florida smokers (as opposed to Florida smokers purchasing cigarettes from retail merchants)?

Yes _____ No _____

If your answer to this question is "No," skip the remaining questions in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the previous question is "Yes," identify the defendant or defendants that plaintiffs have proven made direct sales to Florida smokers, when any such direct sales were made, and what specific brand and brand style of cigarettes were the subject of those direct sales.

Defendant	Period of Direct Sales	Product(s) (Brand & Brand Style)
_____	_____	_____
_____	_____	_____

With respect to the cigarettes identified in response to the preceding question, have plaintiffs proven that any defendant orally or in writing made an express warranty in connection with the direct sale of any of those cigarettes to a Florida smoker about the risks of smoking?

Yes _____ No _____

If your answer to this question is "No," skip the remaining questions in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the preceding question is "Yes," identify the defendant(s) that plaintiffs have proven made any such warranty(ies), the cigarette(s) (brand and brand style) that was (were) the subject of the warranty(ies), the specific warranty(ies) made by that defendant at that time about the cigarette, and the time when the warranty(ies) was (were) made.

Defendant	Product (Brand & Brand Style)	Warranty Made About That Brand & Brand Style	Period of Time
_____	_____	_____	_____
_____	_____	_____	_____

Have plaintiffs proven that any of the cigarettes identified in response to the preceding question did not conform to the warranty(ies) made by the defendant(s) in connection with the sale of those cigarettes?

Yes _____ No _____

If your answer to the preceding question is "No," skip the remaining question in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the preceding question is "Yes," identify each cigarette that plaintiffs have proven did not conform to the warranty(ies) made by the defendant(s) by identifying the defendant, the brand and brand style of cigarette(s), the manner in which the cigarette(s) failed to conform to the warranty(ies) made, and the time period during which the cigarette(s) failed to conform to the warranty(ies) made.

Defendant	Product (Brand & Brand Style)	How Cigarette Failed To Conform to Warranty	Period of Time
_____	_____	_____	_____
_____	_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections and backup proposal, except to state that these questions should be headed "COUNT VIII".

CASE NO. 94-08273 CA22

[Questions Relating to Claim for Breach of Implied Warranty]

PLAINTIFFS' PROPOSAL:

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended, causing loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each of the Defendants, below:

Philip Morris, Incorporated	**Yes_____**	**No_____**
RJ Reynolds Tobacco Company	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes_____**	**No_____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes_____**	**No_____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes_____**	**No_____**

DEFENDANTS' OBJECTIONS:

- This question should not appear on the verdict form. (Defendants' motion for directed verdict on this claim on numerous grounds is currently pending.) Absent privity of contract, the doctrine of strict liability in tort has replaced breach of implied warranty claims. The Florida Standard Jury Instructions, Comment on Model Charge 7, states that an implied warranty claim should be omitted from the verdict form if a strict liability claim exists in the case.

- In order for there to be privity of contract, there has to be a direct sale by a manufacturer to a cigarette consumer who makes a purchase. There is no evidence of that in the record. In addition, coupons, advertising, and gifts do not suffice to create privity of contract.

- Reference to "supply" is improper because Florida law requires a sale for a breach of implied warranty claim

- Plaintiffs' use of the phrase "causing loss, injury or damage" is improper because specific causation has not

been tried and cannot be determined in Phase I; no evidence has been presented in Phase I that would support submission of this issue to the jury. Sections 3 and 4 of the trial plan provide that specific causation, along with other individual issues, will be determined in Phases II and III.

- Reference to "defective" cigarettes is improper because it confuses this question with the question relating to strict liability.

DEFENDANTS' PRIMARY PROPOSAL:

[No question on implied warranty.]

DEFENDANTS' BACKUP PROPOSAL:

If the Court decides, over Defendants' objection, to ask any implied warranty question(s) at all, Defendants propose the following:

Have plaintiffs proven that any defendant sold any cigarettes directly to Florida smokers (as opposed to Florida smokers purchasing cigarettes from retail merchants)?

Yes _____ No _____

If your answer to this question is "No," skip the remaining questions in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the previous question is "Yes," identify the defendant or defendants that plaintiffs have proven made direct sales to Florida smokers, when any such direct sales were made, and what specific brand and brand style of cigarettes were the subject of those direct sales.

Defendant	**Period of Direct Sales**	**Product(s) (Brand & Brand Style)**
_____	_____	_____
_____	_____	_____

Have plaintiffs proven that any of the cigarettes identified in response to the preceding question were not reasonably fit for the ordinary and reasonably foreseeable use of cigarettes?

Yes _____ No _____

If your answer to this question is "No," skip the remaining questions in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the preceding question is "Yes, identify for each cigarette that plaintiffs have proven was not reasonably fit, the defendant who manufactured the cigarette, the brand and brand style of the cigarette, the manner in which the cigarette was not reasonably fit for its ordinary and reasonably foreseeable use, and the period of time during which the cigarette was not reasonably fit.

Defendant	Product (Brand & (Brand Style	Manner In Which Cigarette Not Reasonably Fit	Period of Time
_____	_____	_____	_____
_____	_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections and backup proposal, except to state that these questions should be headed "COUNT IV".

CASE NO. 94-08273 CA22

[Questions Relating to Claim for Punitive Damages]

PLAINTIFFS' PROPOSAL:

Under the circumstances of this case, state below whether punitive damages are warranted against:

Philip Morris, Incorporated	**Yes____**	**No____**
RJ Reynolds Tobacco Company	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes____**	**No____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes____**	**No____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes____**	**No____**
Council for Tobacco Research-U.S.A.	**Yes____**	**No____**
Tobacco Institute	**Yes____**	**No____**

DEFENDANTS' OBJECTIONS:

- This question should not appear on the verdict form because both Florida and U.S. constitutional law prohibit a determination of punitive damages absent a determination of liability. (Defendants' motion to move this issue to Phase II is currently pending.)

- There is evidence that has not been presented in this Phase (because it did not relate to a common issue) that would be relevant to the determination of punitive damages. For example, the jury has not heard any evidence relating Defendants' alleged conduct to Plaintiffs' alleged injuries or conduct.

- Asking whether punitive damages are "warranted" is improper because the appropriateness of an actual award of punitive damages has not been tried and cannot be determined in Phase I. The "standard" instruction is inappropriate for this non-standard case.

- The question fails to ask for specifics (e.g., conduct), rendering it useless for application to individual Plaintiffs in subsequent proceedings in this case.

- The question fails to specify that the appropriate standard of proof for punitive damages is clear and convincing evidence.

- The question fails to indicate that it should be answered only if the questions related to fraud and intentional infliction have been answered in the affirmative.

- The question fails to specify that the conduct for which punitive damages may potentially be awarded must be post-May 5, 1990, reflecting that the limitations period for punitive damages runs from the date of the conduct at issue.

DEFENDANTS' PRIMARY PROPOSAL:

[No question on punitive damages.]

DEFENDANTS' BACKUP PROPOSAL:

If the Court, over Defendants' objection, decides to ask any punitive damages question(s) at all, Defendants propose the following:

Answer this question only if you answered "Yes" to [the fraud question] or [the intentional infliction of emotional distress question] as to one or more defendant(s).

Have plaintiffs proven by clear and convincing evidence that the conduct of any defendant [after May 5, 1990] rose to a level that would permit a potential award of punitive damages?

Yes _____ No _____

If your answer to the preceding question is "Yes," identify the defendant(s) whose conduct plaintiffs have proven rose to a level that would permit a potential award of punitive damages, identify the specific conduct, and identify the time period during which the conduct occurred.

Defendant	Conduct	Time Period
_____	_____	_____
_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections, but proposes re-working Defendants' question as follows:

> **Under instructions provided by the Court, have plaintiffs proven by clear and convincing evidence that the conduct of any defendant since May 5, 1990, was so extreme and outrageous as to meet the threshold test for a potential award of punitive damages?**
>
> **Yes _____ No _____**
>
> **If you answer the preceding question "Yes", identify the defendant(s) whose conduct plaintiffs have proven was so extreme and outrageous as to meet the threshold test, identify the specific conduct, and identify the time period during which the conduct occurred.**

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand delivery to plaintiffs' counsel and to counsel for Liggett Group Inc., and Brooke Group Ltd., on this 14th day of June 1999.

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By: Robert C. Heim
Robert C. Heim, Esq.

APPENDIX D

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA (22)

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

FLA. BAR NOS: 068445
142163

Plaintiffs,

v

DRAFT-I

RJ REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC., PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. and TOBACCO INSTITUTE, INC.,

Defendants.

_____/

ENGLE CLASS NOTICE OF FILING FRAUD, MISREPRESENTATION AND CIVIL CONSPIRACY QUESTIONS FOR USE WITH JURY VERDICT FORM

The Engle Class, by and through Class Counsel file their Notice of Filing issues on fraud, misrepresentation and civil conspiracy, and state:

1. In the event this Court determines that it is appropriate to ask questions of the jurors on the fraud, misrepresentation and civil conspiracy counts, the

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Plaintiff Class has prepared the attached list of questions. These were taken primarily from the Engle Amended Complaint and each question is supported by evidence in the case through testimony and exhibits.

2. It is the position of the Plaintiff Class that the pattern of fraud, deception and concealment and the conspiracy has been ongoing for approximately a half century. The list of specific fraud, misrepresentation and conspiracy issues is necessarily a long one.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was hand delivered to: Robert Heim, Esquire, First Union Financial Center, 200 South Biscayne Boulevard, Suite 3000, Miami, Florida 33131; and Kelly Anne Luther, Esquire, Clarke, Silvergate, Williams & Montgomery, P.A., Suite 2401, New World Tower, 100 N. Biscayne Boulevard, Miami, Florida 33132 this 4th day of June, 1999.

STANLEY M. ROSENBLATT, P.A.
66 West Flagler Street
12th Floor, Concord Building
Miami, Florida 33130
(305) 374-6131

By: Susan Rosenblatt /fm
STANLEY M. ROSENBLATT

By: Susan Rosenblatt
SUSAN ROSENBLATT

ISSUES ON FRAUD AND MISREPRESENTATION

Did the Plaintiff Class prove by the greater weight of the evidence that one or more of the Defendants did the following?

Please answer "Yes" or "No" after each question.

1. Did one or more of the Defendant Tobacco Companies manipulate the levels of nicotine in cigarettes?

Yes_____ No_____

2. Did one or more of the Defendants conceal from the public and the United States Government, internal research establishing that nicotine is addictive?

Yes_____ No_____

3. Has the Council for Tobacco Research served as a public relations front for the member Defendant Tobacco Companies?

Yes_____ No_____

4. Have one or more of the Defendants, either individually, in concert, or through the Council for Tobacco Research or the Tobacco Institute, misled the public by asserting that there is a legitimate controversy as to whether smoking cigarettes cause lung cancer and other diseases – with full knowledge that there is on controversy and smoking does cause lung cancer and other diseases?

Yes_____ No_____

5. Did the Chief Executive Officers from each of the Defendant Tobacco Companies falsely state the following before Congress:

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(i) Smoking cigarettes does not cause lung cancer?

Yes_____ No_____

(ii) Nicotine is not addictive?

Yes_____ No_____

(iii) It is unknown whether any person has ever died from smoking cigarettes?

Yes_____ No_____

6. Did one or more of the Defendant Tobacco Companies intentionally target underage teenagers and children through expansive advertising and promotional campaigns, while claiming the opposite – that the Defendant Tobacco Companies do not market or advertise to underage smokers and do their best to discourage underage smokers?

Yes_____ No_____

7. Has the Tobacco Industry, including all Defendants, spent billions of dollars to hide, cover up and obscure the true facts about smoking and health?

Yes_____ No_____

8. Was Dr. William Ray Morgan, a scientist at Philip Morris, directed to destroy test results revealing that commercial cigarettes had a very high level of nitrosamines, cancer causing carcinogens?

Yes_____ No_____

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9. Was Dr. Frederick Homburger, a grantee of the Council for Tobacco Research, pressured by representatives of the Defendant Tobacco Companies and the Defendant Council for Tobacco Research, to change his scientific findings so as to not reveal that smoking causes cancer of the larynx in hamsters?

Yes_____ No_____

10. Did Philip Morris prohibit its scientists from conducting safety testing on Philip Morris' commercial cigarettes and those of other Defendant tobacco companies because such testing was to be done solely overseas, where negative results would not be available to Plaintiffs in smoking and health litigation within the United States?

Yes_____ No_____

11. Did Philip Morris not permit animal testing within Philip Morris' facilities in the United States, but only in Europe where negative results would not be discoverable in U.S. litigation?

Yes_____ No_____

12. Was Dr. Thomas Osdene's primary role at Philip Morris to develop information to contradict or provide controversy to the established fact that smoking causes lung cancer and other diseases?

Yes_____ No_____

13. Was Dr. Denoble's research or nicotine addiction terminated by Philip Morris because Philip Morris would not engage in internal research that could be damaging to Philip Morris in smoking and health litigation in the United States?

Yes_____ No_____

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14. Did the member Defendant Tobacco Companies form the Council for Tobacco Research (formerly the Tobacco Industry Research Committee) as a public relations sham, to create and perpetuate a false controversy as to whether smoking is hazardous to health and whether smoking causes lung cancer?

Yes_____ No_____

15. Have the member Defendant Tobacco Companies, through the Defendant Tobacco Institute, misrepresented research data relating to the hazards of smoking cigarettes so as to give smokers and the public a false sense of security and to mislead and confuse the public on smoking and health issues?

Yes_____ No_____

16. Did one or more of the Tobacco Companies misrepresent the amount of tar and nicotine on cigarette packages, knowing that the true yield of nicotine and tar may be far greater than that disclosed, depending upon how cigarettes are smoked?

Yes_____ No_____

17. Have one or more of the Tobacco Companies intentionally manipulated the levels of nicotine in low tar cigarettes so as to artificially raise the nicotine levels?

Yes_____ No_____

18. Did one or more of the Tobacco Companies design a filter with tiny, nearly invisible holes with the intention that far less tar and nicotine would be measured through conventional measuring mechanisms, than is actually received in the lungs of smokers?

Yes_____ No_____

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19. Did one or more of the Tobacco Companies intentionally miscalculate and inaccurately measure levels of tar and nicotine in cigarettes so as to understate same and deceive the smoking public?

Yes_____ No_____

20. Did one or more of the Tobacco Companies, either individually or through the Tobacco Institute or the Council for Tobacco Research, through advertising, promotion and other public communications, misrepresent facts to the public, by stating that smoking is not injurious to health and that nicotine is not addictive?

Yes_____ No_____

21. Have one or more of the Tobacco Companies known for decades that the overwhelming majority of adult smokers first begin smoking while underage and in their teenage years and that the large majority of long term and life long customers of cigarette manufacturers became addicted to nicotine as underage teenagers?

Yes_____ No_____

22. Have one or more Defendant Tobacco Companies willfully and consciously marketed cigarettes to underage teenagers?

Yes_____ No_____

23. Have one or more of the Tobacco Companies over the course of decades avoided, concealed, suppressed and failed to disclose information known to it concerning the addictive and harmful properties of its product, cigarettes?

Yes_____ No_____

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24. Have one or more of the Tobacco Companies affirmatively misled the American public by advertising that there is a genuine and legitimate controversy in the scientific community on the subject of smoking and health, when in fact there is no such controversy?

Yes_____ No_____

25. Do the Tobacco Companies assert the public position today that cigarette smoking has not been proven to cause lung cancer, although the Surgeon Generals of the United States and every medical and scientific organization of repute in the United States has declared to the contrary?

Yes_____ No_____

26. Have Defendants Philip Morris, R.J. Reynolds, Brown & Williamson, American Tobacco and Lorillard intentionally violated the representations and promises they made to the American Public and smokers in the Frank Statement, published in 1954, in conscious disregard of public health and safety?

Yes_____ No_____

27. Has the Tobacco Industry spent billions of dollars to hide, cover up and obscure the fact that smoking causes disease and nicotine is addictive?

Yes_____ No_____

28. Has the Council for Tobacco Research (CTR), formerly the Tobacco Industry Research Committee (TIRC), issued many press releases and published articles authored by representatives at CTR – challenging the fact that smoking causes lung cancer and other diseases, since the inception of CTR/TIRC in 1954?

Yes_____ No_____

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29. Has the Council for Tobacco Research intentionally ignored and not disclosed or published to the public at large through press releases, articles or interviews, any data or scientific research conducted through grants by CTR, that supports the fact that smoking causes disease and nicotine is addictive?

Yes_____ No_____

30. Did R.J. Reynolds Tobacco Company intentionally target underage smokers and pre smokers with its "Joe Camel" advertising and promotional campaign?

Yes_____ No_____

31. Do over 80% of lifelong smokers become addicted to smoking while underage smokers?

Yes_____ No_____

32. Have one or more of the Tobacco Companies, the Tobacco Institute and/or the Council for Tobacco Research ignored, manipulated and/or distorted scientific and medical data linking smoking with disease, for the Tobacco Industry's pecuniary gain?

Yes_____ No_____

33. Have one or more of the Defendant Tobacco Companies intentionally manipulated the levels of nicotine in cigarettes so that the public will continue smoking?

Yes_____ No_____

34. Did one or more of the Defendant Tobacco Companies published tobacco advertising that is false or misleading?

Yes_____ No_____

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35. Did one or more of the Tobacco Companies, the Tobacco Institute or the Council for Tobacco Research suppress and conceal information about the addictive nature of nicotine, while at the same time knowing that tobacco companies were intentionally manipulating levels of nicotine so as to keep smokers smoking?

Yes_____ No_____

36. Have one or more of the Tobacco Companies, the Tobacco Institute or the Council for Tobacco Research taken the public position that smoking is not a cause of lung cancer or other diseases and that smoking is not addictive – with full knowledge that cigarettes are addictive and that smoking cigarettes has caused an epidemic of deaths and disease to millions of Americans as well as people throughout the world?

Yes_____ No_____

37. Have one or more of the Tobacco Companies encouraged smokers to switch to low tar cigarettes, through implicit health claims in advertisements, knowing that low tar cigarettes are not safer since smokers will compensate for the reduced nicotine by smoking more cigarettes?

Yes_____ No_____

38. Do one or more of the Tobacco Companies intentionally target the most susceptible and vulnerable individuals as new smokers, including underage adolescents, women, minorities and members of our armed forces during times of combat?

Yes_____ No_____

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ISSUES ON CIVIL CONSPIRACY

1. Did two or more of the Defendants agree to develop a public relations strategy to refute, undermine and neutralize information coming from the scientific and medical communities within the United States, so as to confuse and mislead the public?

Yes_____ No_____

2. Have two or more Defendants agreed to hide and conceal scientific data establishing that nicotine is addictive and that smoking cigarettes causes lung cancer and other diseases?

Yes_____ No_____

3. Did two or more of the Defendants agree to suppress and conceal scientific data and research through the Special Projects Division of the Council for Tobacco Research?

Yes_____ No_____

4. Have two or more of the Defendants agreed to spend billions of dollars yearly to entice new smokers, targeting underage smokers, women and minorities to make up for the smokers who are dying or who have been able to quit?

Yes_____ No_____

5. Have two or more of the Defendants agreed to intentionally miscalculate and inaccurately measure the levels of tar and nicotine in cigarettes so as to understate those measurements and deceive the smoking public?

Yes_____ No_____

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6. Have two or more of the Defendants conspired to misrepresent to the public, that there is a legitimate controversy as to whether smoking cigarettes causes lung cancer and other diseases – with full knowledge that the opposite is true and there is no legitimate controversy within the medical and scientific communities?

Yes_____ No_____

7. Have two or more of the Defendants agreed to misrepresent to the public at large and members of Congress on March 25, 1994 and April 14, 1994, by stating under oath that nicotine is not addictive and cigarettes do not cause any diseases or deaths?

Yes_____ No_____

8. Have two or more Defendants agreed to mislead the American public and the United States Government by falsely stating that the tobacco companies only advertise and promote cigarettes to encourage brand switching and never to entice non smokers or pre-smokers to smoke cigarettes?

Yes_____ No_____

9. Have two or more of the Defendants agreed, through the Special Projects Division of the Council for Tobacco Research, to conceal scientific research and utilize CTR to obtain litigation witnesses and evidence for use in litigation filed by smokers against CTR member Defendant Tobacco Companies?

Yes_____ No_____

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10. Did the Defendant Tobacco Companies develop a Literature Retrieval Division in the Council for Tobacco Research, that contained an extensive world wide library of smoking and health research, that was not made available to scientists at the Council for Tobacco Research or scientists at any of the Defendant Tobacco Companies – and was only made available to lawyers working for the Defendant Tobacco Companies for use in defending Defendant Tobacco Companies against claims by smokers with disease?

Yes_____ No_____

11. Have two or more of the Defendants agreed to misrepresent data to the public so as to convince smokers and the public that there is a controversy as to whether smoking cigarettes causes lung cancer, and that nicotine is not addictive?

Yes_____ No_____

12. Did two or more of the Defendants agree to form the Council for Tobacco Research as a public relations "front" to defend the tobacco companies in public forums, reassure smokers, to defend the member companies in litigation filed by smokers, and to perpetuate a false controversy as to whether smoking is hazardous to health and causes lung cancer and other diseases?

Yes_____ No_____

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13. Did the Tobacco Institute, on behalf of and at the direction of its member Defendant Tobacco Companies since 1957 through the present time, produce and publish numerous booklets, pamphlets, press releases, advertisements, publications, videos and other materials disseminated to the public at large, that contain misrepresentations, half-truths and conceal material facts on the issues of smoking and health, marketing to underage youth, and the addictiveness or dependence producing effects of cigarettes with nicotine?

Yes_____ No_____

14. Did the Tobacco Institute, on behalf of and at the direction of its member Defendant Tobacco Companies engage in a series of speeches, interviews and other oral presentations to the public at large, including smokers, that misrepresented the smoking and health issues and presented a false controversy, to confuse smokers and encourage smokers to continue smoking?

Yes_____ No_____

15. Did two or more of the Defendants agree to a "party line" that cigarettes are not a cause of lung cancer unless and until the "mechanism" is known, fully recognizing that that would be almost an impossible standard to meet, requiring 100% proof, thus perpetuating a false controversy as to whether smoking causes lung cancer and other diseases?

Yes_____ No_____

16. Did two or more of the Defendants agree to perpetuate a false controversy and confuse the smoking public, through their economic influence?

Yes_____ No_____

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APPENDIX E

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
Case No. 94-08273 CA (22)

HOWARD A. ENGLE, M.D., et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, et al.,

Defendants.

THE ORIGINAL FILED
ON JUN 14 1999
IN THE OFFICE OF
CIRCUIT COURT DADE CO. FL

CERTAIN DEFENDANTS'[1] OBJECTIONS TO PLAINTIFFS' PROPOSED FRAUD, MISREPRESENTATION AND CIVIL CONSPIRACY QUESTIONS

[1] These objections are filed on behalf of all defendants except Liggett Group, Inc., and Brooke Group Ltd., Inc. In filing these objections, defendants do not waive any arguments made previously in evidentiary objections, summary judgment motions, directed verdict motions and motions to decertify.

BEST AVAILABLE COPY

I. ISSUES ON FRAUD AND MISREPRESENTATION

A. GENERAL OBJECTIONS

1. Defendants object to any questions pertaining to allegedly fraudulent conduct occurring prior to May 5, 1982, or any product sold prior to 1974.

2. Defendants object on preemption grounds to any questions pertaining to defendants' alleged failure after July 1, 1969 to provide more information regarding the health effects of smoking.

B. SPECIFIC OBJECTIONS

1. Did one or more of the Defendant Tobacco Companies manipulate the levels of nicotine in cigarettes?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **"Manipulate," by itself, is vague, irrelevant, argumentative, and not probative of any actionable conduct**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud questions 17, 33, and 35**

2. Did one or more of the Defendants conceal from the public and the United States government, internal research establishing that nicotine is addictive?

DEFENDANTS' OBJECTIONS:

- **Concealment is not a cause of action in this case under Florida law**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **Argumentative and assumes that internal research establishes that nicotine is addictive; would put Court in position of commenting on evidence**
- **Lack of materiality – concealing information otherwise known to the public cannot be actionable**
- **Irrelevant – neither "the public" nor "the United States government" are parties**

3. Has the Council for Tobacco Research served as a public relations front for the member Defendant Tobacco Companies?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Irrelevant**
- **"Public relations front" is argumentative**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud question 14**

4. Have one or more of the Defendants, either individually, in concert, or through the Council for Tobacco Research or the Tobacco Institute, misled the public by asserting that there is a legitimate controversy as to whether smoking cigarettes causes lung cancer and other diseases – with full knowledge that there is no controversy and smoking does cause lung cancer and other diseases?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact; instead, would be a non-actionable statement of opinion**
- **Not a common, class issue**
- **Vague (and devoid of evidence) in asking whether Defendants acted "through" CTR or the Tobacco Institute**
- **Argumentative and assumes "that there is no controversy and smoking does cause lung cancer and other diseases" – would put Court in position of commenting on evidence**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**
- **Irrelevant – "the public" is not a party**
- **Duplicative of Fraud questions 24 and 36**

5. Did the Chief Executive Officers from each of the Defendant Tobacco Companies falsely state the following before the Congress:

a) Smoking cigarettes does not cause lung cancer?

b) Nicotine is not addictive?

c) It is unknown whether any person has ever died from smoking cigarettes?

DEFENDANTS' OBJECTIONS:

- **No evidence to justify even asking this question; actual testimony is not in evidence and, indeed, the testimony was not as characterized by this misleading question**
- **The language "falsely state" is not adequate in terms of the state of mind required to be actionable under Florida law**
- **First Amendment/Noerr-Pennington/privilege**
- **Not a misstatement of fact; instead, would be a non-actionable statement of opinion**
- **Lack of materiality – Congressional testimony was only one month before this case was filed; no class member could have relied on such testimony and been injured within that one-month period**
- **Compound**
- **Not a common, class issue**

6. Did one or more of the Defendant Tobacco Companies intentionally target underage teenagers and children through expansive advertising and promotional campaigns, while claiming the opposite – that the Defendant Tobacco Companies do not market or advertise to underage smokers and do their best to discourage underage smokers?

DEFENDANTS' OBJECTIONS:

- **Not a common, class issue.**
- **Irrelevant to any cause of action – Court permitted targeting evidence in case only for credibility issue**
- **The alleged "fraud," if that is what it is, is nonsensical. What smoker would decide to smoke (or keep smoking) because the companies deny youth marketing?**
- **Argumentative and inflammatory**
- **Compound**
- **Duplicative of Fraud questions 22, 30, and 38**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **The term "expansive" is vague and irrelevant**

9. Was Dr. Frederick Homburger, a grantee of the Council for Tobacco Research, pressured by representatives of the Defendant Tobacco Companies and the Defendant Council for Tobacco Research, to change his scientific findings so as to not reveal that smoking causes cancer of the larynx in hamsters?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Concealment is not actionable in this case under Florida law**
- **Preemption**
- **Assumes that smoking causes laryngeal cancer in hamsters – would put Court in position of commenting on evidence**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **Evidence showed that Dr. Homburger's research findings were published and were NOT changed - thus, no harm to class occurred**

10. Did Philip Morris prohibit its scientists from conducting safety testing on Philip Morris' commercial cigarettes and those of other Defendant tobacco companies because such testing was to be done solely overseas, where negative results would not be available to Plaintiffs in smoking and health litigation within the United States?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity (e.g., dates) renders any answer useless for Phases 2 or 3**
- **"Safety testing" is vague**
- **Argumentative and assumes (incorrectly) that "negative results" overseas "would not be available to Plaintiffs" – puts Court in position of commenting on evidence**

11. Did Philip Morris not permit animal testing within Philip Morris' facilities in the United States, but only in Europe where negative results would not be discoverable in U.S. litigation?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **"Animal testing" is vague**
- **Lack of specificity (e.g., dates) renders any answer useless for Phases 2 or 3**
- **Argumentative and assumes (incorrectly) that "negative results" overseas "would not be discoverable" – puts Court in position of commenting on evidence**

12. Was Dr. Thomas Osdene's primary role at Philip Morris to develop information to contradict or provide controversy to the established fact that smoking causes lung cancer and other diseases?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Irrelevant**
- **Lack of specificity (e.g., dates) renders any answer useless for Phases 2 or 3**
- **Argumentative and assumes "the established fact that smoking causes lung cancer and other diseases" – puts Court in position of commenting on evidence**

13. Was Dr. DeNoble's research on nicotine addiction terminated by Philip Morris because Philip Morris would not engage in internal research that could be damaging to Philip Morris in smoking and health litigation in the United States?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Irrelevant**
- **Assumes "nicotine addiction" – puts Court in position of commenting on evidence**

14. Did the member Defendant Tobacco Companies form the Council for Tobacco Research (formerly the Tobacco Industry Research Committee) as a public relations sham, to create and perpetuate a false controversy as to whether smoking is hazardous to health and whether smoking causes lung cancer?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Statute of repose**
- **Argumentative ("public relations sham," and "false controversy")**
- **Duplicative of Fraud question 3**

15. Have the member Defendant Tobacco Companies, through the Defendant Tobacco Institute, misrepresented research data relating to the hazards of smoking cigarettes so as to give smokers and the public a false sense of security and to mislead and confuse the public on smoking and health issues?

DEFENDANTS' OBJECTIONS:

- **Not a common, class issue**
- **Lack of specificity renders any answer to this question useless for Phases 2 or 3**
- **Compound, confusing, vague, and argumentative –What data? What hazards? How "misrepresented"? What "false sense of security"?**
- **To "mislead and confuse" is not the standard for actionable conduct in this case under Florida law**
- **Compound**
- **There must be intent to deceive.**
- **Irrelevant – the issue really is whether the Tobacco Institute intentionally made any false statement of FACT, and unless that false statement of fact is specified in terms of substance and time (the fraud-with-specificity requirements that have <u>never</u> been met in this case) this question is useless**
- **Irrelevant - "the public" is not a party**
- **Duplicative of Fraud questions 20 and 23**

16. Did one or more of the Tobacco Companies misrepresent the amount of tar and nicotine on cigarette packages, knowing that the true yield of nicotine and tar may be far greater than that disclosed, depending upon how cigarettes are smoked?

DEFENDANTS' OBJECTIONS:

- **FTC requirement as to how tar and nicotine levels are reported**
- **Preemption**
- **Not a material issue for the entire class – not all smokers wanted to smoke low tar or low nicotine products**
- **Irrelevant**
- **Vague – how "misrepresent"?**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud question 19**

17. Have one or more of the Tobacco Companies intentionally manipulated the levels of nicotine in low tar cigarettes so as to artificially raise the nicotine levels?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **"Manipulated" is vague, irrelevant, and argumentative**
- **Irrelevant – no evidence this occurred with respect to any cigarette sold to public**
- **Duplicative of Fraud questions 1, 33, and 35**

18. Did one or more of the Tobacco Companies design a filter with tiny, nearly invisible holes with the intention that far less tar and nicotine would be measured through conventional measuring mechanisms, than is actually received in the lungs of smokers?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Argumentative**
- **Refuted by Farone's testimony**

19. Did one or more of the Tobacco Companies intentionally miscalculate and inaccurately measure levels of tar and nicotine in cigarettes so as to understate same and deceive the smoking public?

DEFENDANTS' OBJECTIONS:

- **FTC requirement as to how tar and nicotine levels are reported**
- **Preemption**
- **Misleading – there was no evidence that Defendants' tar and nicotine numbers are not the same as the actual FTC test results**
- **Irrelevant –the "smoking public" is not a party**
- **Not a material issue for the entire class – not all smokers wanted to smoke low tar or law nicotine products**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud question 16**

20. Did one or more of the Tobacco Companies, either individually or through the Tobacco Institute or the Council for Tobacco Research, through advertising, promotion and other public communications, misrepresent facts to the public, by stating that smoking is not injurious to health and that nicotine is not addictive?

DEFENDANTS' OBJECTIONS:

- **Not a common, class issue**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Irrelevant – "the public" is not a party**
- **Compound**
- **No evidence in the record to justify even asking this question. In "The Frank Statement," the authors said that they "believe[d]" the products they made were not injurious to health – that is a non-actionable statement of opinion, not fact**
- **Duplicative of Fraud questions 15 and 23**

21. Have one or more of the Tobacco Companies known for decades that the overwhelming majority of adult smokers first begin smoking while underage and in their teenage years and the large majority of long term and life long customers of cigarette manufacturers became addicted to nicotine as to underage teenagers?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Not a common, class issue.**
- **Argumentative; assumes as a fact that smokers start as youths and become "addicted" – puts the Court in position of commenting on evidence**
- **Irrelevant to any cause of action**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**
- **Vague to the point of being useless for Phases 2 or 3 – known for "decades"? "Overwhelming" or "large" majority?**

22. Have one or more Defendant Tobacco Companies willfully and consciously marketed cigarettes to underage teenagers?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Court permitted this issue to come into the case only with respect to credibility**
- **Not a common, class issue**
- **Irrelevant to any cause of action**
- **Duplicative of Fraud questions 6 and 38**
- **The language "willfully and consciously" is not relevant to the intent required under Florida law**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**

23. Have one or more of the Tobacco Companies over the course of decades avoided, concealed, suppressed and failed to disclose information known to it concerning the addictive and harmful properties of its product, cigarettes?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **The language "avoided, concealed, suppressed and failed to disclose" is not the standard for actionable conduct in this case under Florida law**
- **Compound**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **Argumentative and assumes "the addictive and harmful properties" of cigarettes – would put the Court in position of commenting on evidence**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud questions 15 and 20**

24. Have one or more of the Tobacco Companies affirmatively misled the American public by advertising that there is a genuine and legitimate controversy in the scientific community on the subject of smoking and health, when in fact there is no such controversy?

DEFENDANTS' OBJECTIONS:

- **Duplicative of Fraud questions 4 and 36, and subject to the same objections**
- **Not an actionable misrepresentation of fact; instead, would be a non-actionable statement of opinion**
- **Not a common, class issue**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**
- **Irrelevant – the "American public" is not a party**
- **Argumentative and assumes that "in fact there is no such controversy" – would put Court in position of commenting on evidence**

25. Do the Tobacco Companies assert the public position today that cigarette smoking has not been proven to cause lung cancer, although the Surgeon Generals of the United States and every medical and scientific organization of repute in the United States has declared to the contrary?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Position "today" is irrelevant to any cause of action in this case**
- **Argumentative and assumes conclusion that "every medical and scientific organization of repute" has concluded that cigarettes have been proved to cause lung cancer – puts Court in position of commenting on evidence**

26. Have Defendants Philip Morris, R.J. Reynolds, Brown & Williamson, American Tobacco and Lorillard intentionally violated the representations and promises they made to the American Public and smokers in the Frank Statement, published in 1954, in conscious disregard of public health and safety?

DEFENDANTS' OBJECTIONS:

- **Failure to carry out a promise is not a fraud unless, at the time of the promise, there was no intention to carry out the promise**
- **Irrelevant – "the American public" and "public health and safety" are not at issue**
- **Vagueness and lack of specificity as to "the representations and promises"**
- **Argumentative**

27. Has the Tobacco Industry spent billions of dollars to hide, cover up and obscure the fact that smoking causes disease and nicotine is addictive?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **The "Tobacco Industry" is not a party**
- **To "hide, cover up and obscure" is not the standard for actionable conduct in this case under Florida law**
- **Expenditures are irrelevant**
- **Argumentative and inflammatory**
- **Assumes "the fact that smoking causes disease and nicotine is addictive" – would put Court in position of commenting on evidence**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud questions 7, 20, and 23**

28. Has the Council for tobacco Research (CTR), formerly the Tobacco Industry Research Committee (TIRC), issued many press releases and published articles authored by representatives at CTR – challenging the fact that smoking causes lung cancer and other diseases, since the inception of CTR/TIRC in 1954?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity (which "press releases and published articles"?) renders any answer useless for Phases 2 or 3**
- **Argumentative and assumes "the fact that smoking causes lung cancer and other diseases" – would put Court in position of commenting on evidence**
- **Irrelevant – commercial speech is protected by First Amendment**

29. Has the Council for Tobacco Research intentionally ignored and not disclosed or published to the public at large through press releases, articles or interviews, any data or scientific research conducted through grants by CTR, that supports the fact that smoking causes disease and nicotine is addictive?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **To "intentionally ignore[] and not disclose[] or publish[]" is not the standard for actionable conduct in this case under Florida law**
- **Argumentative and assumes CTR had duty to issue press releases, etc. - puts Court in position of commenting on evidence**
- **Argumentative and assumes "the fact that smoking causes disease and nicotine is addictive" – puts Court in position of commenting on evidence**
- **Lack of specificity renders any answer useless for Phases 2 or 3**

30. Did R.J. Reynolds Tobacco Company intentionally target underage smokers and pre smokers with its "Joe Camel" advertising and promotional campaign?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Not a common, class issue**
- **Vague as to "pre-smokers"**
- **Duplicative of questions 6, 22, and 38**
- **Irrelevant to any cause of action**
- **Court permitted this issue to come into the case only with respect to credibility**
- **Preemption**

31. Do over 80% of lifelong smokers become addicted to smoking while underage smokers?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Not a common, class issue.**
- **Irrelevant to any cause of action**
- **Argumentative**

32. Have one or more of the Tobacco Companies, the Tobacco Institute and/or the Council for Tobacco Research ignored, manipulated and/or distorted scientific and medical data linking smoking with disease, for the Tobacco Industry's pecuniary gain?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **To "ignore[], manipulate[] and/or distort[]" is vague and not the standard for actionable conduct in this case under Florida law**
- **Compound**
- **The "Tobacco Industry" is not a party**
- **Irrelevant to any cause of action**
- **Argumentative – "pecuniary gain" is inflammatory**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**

33. Have one or more of the Defendant Tobacco Companies intentionally manipulated the levels of nicotine in cigarettes so that the public will continue smoking?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Irrelevant – "the public" is not a party**
- **Duplicative of Fraud questions 1, 17, and 35**

34. Did one or more of the Defendant Tobacco Companies published [sic] tobacco advertising that is false or misleading?

DEFENDANTS' OBJECTIONS:

- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **"Misleading" is not actionable**
- **Requires fraudulent intent**
- **Vague as to time; if post-1969, runs afoul of preemption**

35. Did one or more of the Tobacco Companies, the Tobacco Institute or the Council for Tobacco Research suppress and conceal information about the addictive nature of nicotine, while at the same time knowing that tobacco companies were intentionally manipulating levels of nicotine so as to keep smokers smoking?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **To "suppress and conceal" is not the standard for actionable conduct in this case under Florida law**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**
- **Compound nature of the question makes it argumentative**
- **Assumes "addictive nature of nicotine" and nicotine manipulation – puts Court in position of commenting on evidence**
- **Duplicative of Fraud questions 1, 17, and 33**

36. Have one or more of the Tobacco Companies, the Tobacco Institute or the Council for Tobacco Research taken the public position that smoking is not a cause of lung cancer or other diseases and that smoking is not addictive – with full knowledge that cigarettes are addictive and that smoking cigarettes has caused an epidemic of deaths and disease to millions of Americans as well as people throughout the world?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Argumentative – "epidemic of deaths and disease to millions of Americans as well as people throughout the world" is inflammatory – puts Court in position of commenting on evidence**
- **Irrelevant to this class whether "millions of Americans as well as people throughout the world" were harmed**
- **No evidence that any Defendant made a factual statement that "smoking is not a cause of lung cancer or other diseases"**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud questions 2, 4, 20, 23, 24, 27, and 32**

37. Have one or more of the Tobacco Companies encouraged smokers to switch to low tar cigarettes, through implicit health claims in advertisements, knowing that low tar cigarettes are not safer since smokers will compensate for the reduced nicotine by smoking more cigarettes?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **"Encouraged" is vague**
- **"[I]mplicit health claims" do not constitute an actionable misrepresentation under Florida law**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Preemption**
- **Argumentative and assumes that "smokers will compensate" – puts Court in position of commenting on evidence**
- **Duplicative of Fraud questions 16, 19, 20, 23, 27, 32, and 36**

38. Do one or more of the Tobacco Companies intentionally target the most susceptible and vulnerable individuals as new smokers, including underage adolescents, women, minorities and members of our armed forces during times of combat?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Not a common, class issue**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Court permitted this issue to come into the case to show credibility, not fraud**
- **Argumentative, inflammatory questions**
- **Duplicative of Fraud questions 6 and 22**
- **Irrelevant to any cause of action**
- **Argumentative and assumes without evidence that certain groups are "susceptible and vulnerable" – puts Court in position of commenting on evidence**
- **No evidence to justify even asking question about armed forces**

II. ISSUES ON CIVIL CONSPIRACY

A. GENERAL OBJECTIONS

1. Defendants object to any questions pertaining to allegedly fraudulent conduct occurring prior to May 5, 1982, or any product sold prior to 1974.

2. Defendants object on preemption grounds to any questions pertaining to defendants' alleged failure after July 1, 1969 to provide more information regarding the health effects of smoking.

3. Defendants object to any conspiracy questions that do not specify the alleged unlawful act or unlawful means allegedly agreed upon by the parties to the conspiracy.

B. SPECIFIC OBJECTIONS

1. Did two or more of the Defendants agree to develop a public relations strategy to refute, undermine and neutralize information coming from the scientific and medical communities within the United States, so as to confuse and mislead the public?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Irrelevant - public relations and the confusion or misleading of "the public" is not an issue in this case**
- **To "neutralize" clearly implicates preemption**
- **Compound and confusing**
- **Duplicative of Conspiracy question 12**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**

2. Have two or more Defendants agreed to hide and conceal scientific data establishing that nicotine is addictive and that smoking cigarettes causes lung cancer and other diseases?

DEFENDANTS' OBJECTIONS:

- **Irrelevant – to "hide and conceal" is not the standard for actionable conduct in this case under Florida law**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**
- **Merely a reformulation of Fraud questions 20, 23, 27, 32, and 36, and subject to the same objections**
- **Argumentative and assumes "data establishing that nicotine is addictive" – puts Court in position of commenting on evidence**
- **No evidence to justify even asking this question**

3. Did two or more of the Defendants agree to suppress and conceal scientific data and research through the Special Projects Division of the Council for Tobacco Research?

DEFENDANTS' OBJECTIONS:

- **Irrelevant – to "suppress and conceal" is not the standard for actionable conduct in this case under Florida law**
- **No evidence to justify even asking this question**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**
- **Duplicative of Conspiracy question 9**

4. Have two or more of the Defendants agreed to spend billions of dollars yearly to entice new smokers, targeting underage smokers, women and minorities to make up for the smokers who are dying or who have been able to quit?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Expenditures are irrelevant**
- **Preemption**
- **Argumentative and assumes need "to make up for the smokers who are dying or who have been unable to quit" – puts Court in position of commenting on evidence**
- **No evidence to justify even asking this question**
- **Lack of overt act**
- **No underlying tort**
- **Merely a reformulation of Fraud question 38, and subject to the same objections**
- **Lack of specificity as to time and parties to the alleged agreement**

5. Have two or more of the Defendants agreed to intentionally miscalculate and inaccurately measure the levels of tar and nicotine in cigarettes so as to understate those measurements and deceive the smoking public?

DEFENDANTS' OBJECTIONS:

- **Irrelevant – "the smoking public" is not a party**
- **Preemption**
- **FTC requirement as to how tar and nicotine levels are reported**
- **Merely a reformulation of Fraud question 19, and subject to the same objections**
- **No evidence to justify even asking this question**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**

6. Have two or more of the Defendants conspired to misrepresent to the public, that there is a legitimate controversy as to whether smoking cigarettes causes lung cancer and other diseases – with full knowledge that the opposite is true and there is no legitimate controversy within the medical and scientific communities?

DEFENDANTS' OBJECTIONS:

- **Irrelevant and argumentative**
- **"The public" is not a party**
- **Assumes "that the opposite is true and there is no legitimate controversy within the medical and scientific communities" – puts Court in position of commenting on evidence**
- **No evidence to justify even asking this question**
- **Duplicative of Conspiracy question 11**
- **Merely reformulates Fraud questions 2, 20, 23, 27, 32, and 36, and subject to the same objections**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**

7. Have two or more of the Defendants agreed to misrepresent to the public at large and members of Congress on March 25, 1994 and April 14, 1994, by stating under oath that nicotine is not addictive and cigarettes do not cause any diseases or deaths?

DEFENDANTS' OBJECTIONS:

- **Irrelevant – "the public at large and members of Congress" are not parties**
- **No underlying tort - a statement of opinion is not actionable**
- **No evidence to justify even asking this question – in fact, misstates testimony**
- **First Amendment/Noerr-Pennington/privilege**
- **Lack of specificity as to time and parties to the alleged agreement**
- **Merely a reformulation of Fraud question 5, and subject to the same objections**

8. Have two or more Defendants agreed to mislead the American public and the United States Government by falsely stating that the tobacco companies only advertise and promote cigarettes to encourage brand switching and never to entice non smokers or pre-smokers to smoke cigarettes?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Irrelevant – no one could start smoking or refrain from quitting in reasonable reliance on advertising**
- **Irrelevant – "the American public and the United States Government" are not parties**
- **Misstates evidence – several witnesses also discussed advertising's effect on brand loyalty of existing consumers**
- **Argumentative and assumes that companies advertise to "entice" non-smokers – puts Court in position of commenting on evidence**
- **Preemption**
- **No underlying tort**
- **No evidence to justify even asking this question**
- **Lack of specificity as to time and parties to the alleged agreement**

9. Have two or more of the Defendants agreed, through the Special Projects Division of the Council for Tobacco Research, to conceal scientific research and utilize CTR to obtain litigation witnesses and evidence for use in litigation filed by smokers against CTR member Defendant Tobacco Companies?

DEFENDANTS' OBJECTIONS:

- **No actionable misrepresentation of fact**
- **Irrelevant – no one could start smoking or refrain from quitting in reasonable reliance on CTR Special Projects**
- **No underlying tort**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**
- **Duplicative of Conspiracy question 3**

10. Did the Defendant Tobacco Companies develop a Literature Retrieval Division in the Council for Tobacco Research, that contained an extensive world wide library of smoking and health research, that was not made available to scientists at the Council for Tobacco Research or scientists at any of the Defendant Tobacco Companies – and was only made available to lawyers working for the Defendant Tobacco Companies for use in defending Defendant Tobacco Companies against claims by smokers with disease?

DEFENDANTS' OBJECTIONS:

- **No actionable misrepresentation of fact**
- **Irrelevant – no smoker could conceivably have been injured by existence of Literature Retrieval Division of CTR**
- **Argumentative**
- **No underlying tort**
- **Does not even allege any agreement**

11. Have two or more of the Defendants agreed to misrepresent data to the public so as to convince smokers and the public that there is a controversy as to whether smoking cigarettes causes lung cancer, and that nicotine is not addictive?

DEFENDANTS' OBJECTIONS:

- **Lack of specificity as to time and parties to the alleged agreement**
- **Lack of overt act**
- **Irrelevant – "the public" is not a party**
- **Duplicative of Conspiracy question 6**
- **Merely reformulates Fraud questions 2, 20, 23, 27, 32, and 36, and subject to the same objections**
- **No evidence to justify even asking this question**

12. Did two or more of the Defendants agree to form the Council for Tobacco Research as a public relations "front" to defend the tobacco companies in public forums, reassure smokers, to defend the member companies in litigation filed by smokers, and to perpetuate a false controversy as to whether smoking is hazardous to health and causes lung cancer and other diseases?

DEFENDANTS' OBJECTIONS:

- **No actionable misrepresentation of fact**
- **Irrelevant – no smoker could have reasonably and detrimentally relied upon any CTR conduct**
- **No underlying tort**
- **Lack of overt act**
- **Argumentative and assumes existence of "false controversy" – puts Court in position of commenting on evidence**
- **Duplicative of Conspiracy question 1**
- **Merely reformulates Fraud questions 3 and 14, and subject to the same objections**
- **Lack of specificity as to time and parties to the alleged agreement**

13. Did the Tobacco Institute, on behalf of and at the direction of its member Defendant Tobacco Companies since 1957 through the present time, produce and publish numerous booklets, pamphlets, press releases, advertisements, publications, videos and other materials disseminated to the public at large, that contain misrepresentations, half-truths and conceal material facts on the issues of smoking and health, marketing to underage youth, and the addictiveness or dependence producing effects of cigarettes with nicotine?

DEFENDANTS' OBJECTIONS:

- **No actionable misrepresentation of fact**
- **Irrelevant – no evidence of a Tobacco Institute misstatement of FACT that any smoker could reasonably and detrimentally relied upon**
- **"Half-truths" is vague and argumentative**
- **Argumentative and assumes "marketing to underage youth, and the addictiveness or dependence producing effects of cigarettes with nicotine" – puts Court in position of commenting on evidence**
- **No underlying tort**
- **Compound**
- **No allegation of agreement**
- **Improper coupling of "addictiveness or dependence producing"**
- **Lack of specificity renders any answer to this question useless for Phases 2 or 3**

14. Did the Tobacco Institute, on behalf of and at the direction of its member Defendant Tobacco Companies engage in a series of speeches, interviews and other oral presentations to the public at large, including smokers, that misrepresented the smoking and health issues and presented a false controversy, to confuse smokers and encourage smokers to continue smoking?

DEFENDANTS' OBJECTIONS:

- **Irrelevant – no evidence of a Tobacco Institute misstatement of FACT that any smoker could reasonably and detrimentally relied upon**
- **Argumentative and assumes "false controversy" – puts Court in position of commenting on evidence**
- **No underlying tort**
- **No allegation of agreement**
- **Lack of specificity renders any answer to this question useless for Phases 2 or 3**

15. Did two or more of the Defendants agree to a "party line" that cigarettes are not a cause of lung cancer unless and until the "mechanism" is known, fully recognizing that that would be almost an impossible standard to meet, requiring 100% proof, thus perpetuating a false controversy as to whether smoking causes lung cancer and other diseases?

DEFENDANTS' OBJECTIONS:

- **Irrelevant**
- **No underlying tort – statement of opinion is not actionable**
- **Lack of overt act**
- **"Party line" is argumentative**
- **Argumentative and misleading to equate "mechanism" with "an impossible standard" of "100% proof" – puts Court in position of commenting on evidence**
- **Assumes "false controversy" – puts Court in position of commenting on evidence**
- **Lack of specificity as to time and parties to the alleged agreement**

16. Did two or more of the Defendants agree to perpetuate a false controversy and confuse the smoking public, through their economic influence?

DEFENDANTS' OBJECTIONS:

- **No actionable misrepresentation of fact**
- **Irrelevant – no evidence in this case that any smoker reasonably and detrimentally relied upon any misstatement of FACT based upon defendants' "economic influence"**
- **Irrelevant – "economic influence" prong of Florida conspiracy law is neither applicable nor pleaded here, and there has been no showing of "malicious motive" or "peculiar power of coercion," which are required in those rare cases involving conspiracy via "economic influence"**
- **Argumentative and unintelligible**
- **Assumes existence of "false controversy" – puts Court in position of commenting on evidence**
- **No underlying tort**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**

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WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand delivery to plaintiffs' counsel and to counsel for Liggett Group Inc., and Brooke Group Ltd. on this 14th day of June, 1999.

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APPENDIX F

RECORD MATERIALS RELATED TO PRESERVATION OF DUE PROCESS ISSUE

Brief in Opposition at 7: "Contrary to their position here, petitioners had previously proposed far more general questions for the Phase I verdict form than the questions of ultimate fact contained in the verdict form that was used. R.337[7]2-33811."

R.33784-33785: "[Certain Defendants'] Phase I, Stage I Issues For The Jury" (April 21, 1998) (emphasis added)

In accordance with the Court's Order on Trial Plan Issues, certain Defendants submit the following questions as the issues to be resolved in Phase I, Stage 1, of the Trial Plan Order. *These questions reflect the essence of the six common questions listed by Judge Solomon in the original Order of October 31, 1994, certifying the class.*

1. Has it been scientifically proven that smoking cigarettes can cause disease, including lung cancer, heart disease, and emphysema?

   Yes _____ No _____

2. A. Is the nicotine in tobacco addictive?

   Yes _____ No _____

   B. If "yes," are all smokers addicted to tobacco?

   Yes _____ No _____

   C. If you answer 2B, "yes," are some smokers able to quit?

   Yes _____ No _____

3. Prior to July 1, 1969, did Defendants conceal the results of scientific studies proving that smoking cigarettes causes diseases including lung cancer, heart

disease, and emphysema, which information was not otherwise known or available?

Yes _____ No _____

4. Has the level of nicotine in cigarettes been artificially maintained or manipulated by the Defendants so as to create an addiction in smokers and for the purpose of continuing that addiction?

Yes _____ No _____

5. Was the "Special Projects" division of the Council for Tobacco research established for the purpose of concealing medical research under he misuse of the attorney-client privilege?

Yes _____ No _____

6. Prior to July 1, 1969, did the Defendants have a duty to warn all members of the class that consumption of their product, cigarette, would cause addiction? Note that the existence of a duty to warn is a question of law for the Court, not the jury.

"Defendants Tentative Proposed Verdict" (June 5, 1998) (discussed at Hearing of June 5, 1998) (Excerpts)

JURY VERDICT FORM

5. Prior to July 1, 1969, did one or more Defendants conceal the results of scientific studies, not otherwise known or available, proving that smoking cigarettes can cause any of the diseases or medical conditions [found by the jury to have been scientifically proven to be caused by smoking]?

* * *

6. If your answer to question 5 is "yes" for any Defendant, *identify the scientific studies concealed by that Defendant and when such studies were concealed.*

7. . . . . Prior to July 1, 1969, did one or more Defendants conceal the results of scientific studies, not otherwise known or available, proving that cigarettes that contain nicotine are addictive?

* * *

8. If your answer to question 7 is "yes" for any Defendant, *identify the scientific studies concealed by that Defendant and when such studies were concealed.*

* * *

12. Did two or more Defendants agree together to conceal the results of scientific studies, not otherwise known or available, proving that smoking cigarettes can cause any of the diseases or medical conditions [found by the jury to have been scientifically proven to be caused by smoking]?

* * *

13. If your answer to question 12 is "yes" for any two or more Defendants, *identify when each of those Defendants agreed together and the scientific studies those Defendants agreed to conceal.*

14. Did two or more Defendants agree together to conceal the results of scientific studies not otherwise known or available proving that cigarettes containing nicotine are addictive?

* * *

15. If your answer to question 14 is "yes" for any two or more Defendants, *identify when each of those Defendants agreed together and the scientific studies those Defendants agreed to conceal.*]

R.35947-36007: Hearing (June 5, 1998) (emphasis added)

MR. HEIM: If I may, Judge, let me hand up the defendants' proposed [i.e., the June 5, 1998, proposal excerpted immediately above].

Now, as I said, Judge, originally what we gave Your Honor last time [i.e., the April 21, 1998, document, referenced above], were the questions modeled -- just the six questions -- in Judge Solomon's order.

I think probably the safest thing that we could do in terms of ensuring that we weren't going beyond what was necessary to do in the common issues phase of the trial, would be to use those six questions, since they have already been certified and approved. The Third DCA cited them with approval as being yes, these are common questions. We know they're individual issues, but these are common questions. That's why we used them.

But to try, after Your Honor said it would be helpful, to break these causes of action down, it then occurred to us to try to capture more from the causes of action that are up there, and capture more from the Complaint, the Amended Complaint in the case. That's what this proposed [June 5, 1998] jury verdict form does.

* * *

We also break down, as I think plaintiffs have with a number of the questions, to list the individual defendants. And we have placed into a number of the questions a time-period limitation to reflect the Court's preemption decision.

So our view is that Question Number 5, for example, has to be asked in terms of prior to July 1, 1969, because the Court's decision is that concealing the results of scientific studies is another way to say failing to warn about them, and that's preempted after July 1, 1969.

A number of our questions also require the jury to say when and what. Now, that's not the usual thing to ask juries to say when and what; but it is not without precedent. It is done frequently in the asbestos litigation when courts are trying to deal with across-the-board issues and they want the jury to give them findings that they can apply to more than one person.

So, breaking down and asking the jury to give time periods, and in some instances to say what, is done, and in this case would permit Your Honor to know and for all of us to know how to apply the finding of the jury.

So that is the approach of the defendants, which is basically to ask fact questions, don't ask causes of action,

and to get the jury where it's important to do so, to particularize the answer.

We think that by doing it that way, we will avoid choice-of-law issues, we will get questions that can be applied across the board, and then when we get to the Phase II individual representatives trial, the class representatives, people who are class representatives, and Phase III, the individual class members will have findings that will be meaningful and will have been worth the investing of these significant resources of Your Honor's time.

R.36226-36292: Hearing (June 12, 1998)

MR. HEIM [DEFENSE COUNSEL]: . . . . [W]hat is the difference between the way the plaintiffs have approached it [the Phase I verdict form] and the way the defendants have approached it [in the June 5, 1998, defense proposal excerpted above]? . . . I'm going to try to illustrate it with two points, and to do that I'm going to point to some of the plaintiffs' [proposed] questions and some of the defendants' [proposed] questions.

* * *

The [proposed] question the plaintiffs ask is, "Did the defendants make a false statement of fact?" Now, without a fair number of follow-up questions and clarifying questions, that statement, if the jury answers yes to that, it is of almost no value to the class. Almost no value to the class.

And the reason I say that, Judge, is that I know from the complaint and I know from the pretrial proceedings, the plaintiffs are going to offer evidence of lots of false statements, what they believe to be false statements of

facts. There's not going to be one; there's going to be a bunch of them.

* * *

So, if the jury answers that particular question yes, we won't know what false statement it was. And the people in the class who have to prove reliance on a false statement [in future trials before new juries] won't be able to know. We won't be able to tell whether they relied or not; they won't be able to say whether they relied or not because we won't know what it was.

* * *

So do you see the problem with that kind of situation, Judge, in terms of applying it across the board to the class when we get to Phase 3? There will be a finding; it will say the defendants made a false statement of fact; we'll get to that trial; whoever the trial judge is at that point will say: Okay, we know that the defendants made a false statement of fact; the individual plaintiff will present certain circumstances about when he or she started smoking, when he or she read things or heard things and nobody will know how that applies to whatever the false statement was or wasn't.

* * *

. . . . And the same thing applies when you ask – their [plaintiffs' proposed] Question 7 says: Was there negligence on the part of the defendants?" And if the jury answers that yes – let's say the jury comes back and answers that yes, but we don't know whether the negligence was a failure to test the product properly; a negligent inclusion of harmful ingredients; we don't know whether it's a negligent design; we don't know whether it's a negligent failure to warn. And depending upon what it is, it will affect different people in the class differently.

R. 48499-48563: "Certain Defendants' Preliminary Draft Phase I Trial Verdict Form" (June 4, 1999)

[Reproduced at Appendix B, *supra*]

T.35897 (June 10, 1999)

> MR. MOODHE [DEFENSE COUNSEL]: And once again, just in terms of specificity, we are dealing with a complaint that covers half a century or more of cigarette design and sale. Cigarettes didn't remain the same throughout that period of time. Knowledge about ways to design cigarettes was not the same throughout that period of time.
>
> And in order to effectively try in Phase II or III a strict liability claim, we need to know specifically what it is that either is defective or was a safer alternative design.
>
> And as I said before, that has been our approach [on the defendants' proposed verdict form], not just on this question [related to strict liability], but on all of the questions, to get information out of the jury process that can be imported and apply with some degree of specificity and intelligence to a class period that spans half a century.

R. 49142-49172: "Outline of Plaintiffs' Proposed Phase I Verdict Form Questions And Certain Defendants' Objections And Counter-Proposals Thereto" (June 14, 1999)

[Reproduced at Appendix C, *supra*]

Brief in Opposition at 7: "Although R.J. Reynolds Tobacco Company represented to the trial court that it was 'incumbent upon all of us' to provide additional 'enumerated' statements for a more detailed verdict form (T.35954), petitioners never did so."

T. 35953-35954 (June 11, 1999):

> MR. KIRBY [REYNOLDS COUNSEL]: Your Honor, consistent with the discussion that we had yesterday about the need for a verdict form in Phase I that we can carry into Phase II and Phase III, so that it has meaning, we believe that here has to be some degree of specificity.
>
> If you merely ask this jury whether the defendants made a misstatement of a material fact, and they are not required to identify what it is, when you go into the Phase II and Phase III trials of the individual smokers' claims, that finding will have no meaning.
>
> So we believe that, for it to have meaning going forward, it needs specificity.
>
> So how do we go about doing that?
>
> I think what is incumbent upon all of us is to identify what are the claimed misrepresentations of material fact; and if those are going to be enumerated, then so be it. But without doing that, for the life of me, I can't figure out what we do with a finding that some defendant at some time made some misstatement of fact.

Brief in Opposition at 7: "Petitioners also objected to a series of additional questions proposed by the class which were based on allegations in the amended complaint. R.49258-72."

T.35966-71 (June 11, 1999):

MR. HEIM [DEFENSE COUNSEL]: Your Honor, the only other thing I would mention here is plaintiffs handed up to Your Honor a whole bunch of questions [*see* Appendix D, *supra*] * * * I think – I just started reading them, and it occurred to me that many of them, by themselves are – would either not be actionable or make any sense.

THE COURT: I'll tell you what you do. You haven't read them, right?

MR. HEIM: I've looked at them.

THE COURT: But if you look at these questions –

MR. HEIM: We may want to comment on them.

THE COURT: If you want to agree with some of them and disagree with others, let me know.

MR. HEIM: If we want to comment on them, I'll let you know.

THE COURT: Some of the questions may be exactly what you have in mind as to specificity. I don't know.

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: Just for the record, we did provide those last week. It wasn't just this morning.

MR. HEIM: No, I understand that. But I'm saying that our view is that the approach we used was the correct approach. But I wanted to point out that some of those questions wouldn't make any sense, in any event.

But I can do that later in a separate submission [*see* Appendix E, *supra*].

R.49258-72: "Certain Defendants' Memorandum In Support Of Objections To Plaintiffs' Proposed Fraud, Misrepresentation and Civil Conspiracy Questions [*see* Appendix D, *supra*]" (June 14. 1999) (Excerpt)

> Plaintiffs, as the proponents of this purported class action and the party with the burden of proof, have the responsibility to provide this Court with proposed jury verdict questions which reflect the law and the answers to which can be usefully applied to the many Phase II and III trials. Plaintiffs' attempt fails utterly.
>
> ***
>
> Answers to the non-specific fraud and conspiracy questions proposed by plaintiffs [*see* Appendix D, *supra*] will be of no value in the individual trials of what plaintiffs allege to be a class consisting of hundreds of thousands of plaintiffs. It is simply not good enough to ask whether defendants made a misrepresentation on the subject of causation or addiction. The jury finding must identify the specific misrepresentation, how it was false, who made it, when and where. Only then can members try to prove reasonable and detrimental reliance on that misrepresentation in individual trials.

R.49296-49322: "Certain Defendants' Objections To Plaintiffs' Proposed Fraud, Misrepresentation and Civil Conspiracy Questions" (June 14, 1999) [*see* Appendix E, *supra*]

Brief In Opposition at 7: "Despite being repeatedly requested to do so by the trial court, petitioners failed to submit a feasible alternative verdict form. R.49258-72; 49296-49322; T.35967-68."

Brief in Opposition at 16: "Petitioners declined the trial court's repeated invitation to revise the verdict form, saying that it was not "defendants' job" to prepare and submit an acceptable form. T.36298-99."

T.35966-71 (June 11, 1999):

MR. HEIM [DEFENSE COUNSEL]: Your Honor, the only other thing I would mention here is plaintiffs handed up to Your Honor a whole bunch of questions [*see* Appendix D, *supra*]. * * * I think – I just started reading them, and it occurred to me that many of them, by themselves are – would either not be actionable or make any sense.

THE COURT: I'll tell you what you do. You haven't read them, right?

MR. HEIM: I've looked at them.

THE COURT: But if you look at these questions –

MR. HEIM: We may want to comment on them.

THE COURT: If you want to agree with some of them and disagree with others, let me know.

MR. HEIM: If we want to comment on them, I'll let you know.

THE COURT: Some of the questions may be exactly what you have in mind as to specificity. I don't know.

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: Just for the record, we did provide those last week. It wasn't just this morning.

MR. HEIM: No, I understand that. But I'm saying that our view is that the approach we used was the correct

approach. But I wanted to point out that some of those questions wouldn't make any sense, in any event.

But I can do that later in a separate submission.

MR. SCHNEIDER [DEFENSE COUNSEL]: Your Honor, with respect to those questions, I would submit that many of them are argumentative, and that that is not the solution to put before a jury, argumentative roll call of questions drawn out of the plaintiffs' complaint. I would direct Your Honor's attention again to the defendants' submission on fraud. The questions are simple. They're shorter. They're tied more closely to the law, and we would submit that you go with our fraud –

***

THE COURT: If you look at specificity as to the complaint. In other words, what I'm looking at. If you look at the complaint and say in the complaint: Certain allegations were made that the defendants did X, Y and Z, you could tailor questions, saying: Did the plaintiff prove that the defendants did X, Y and Z?

That can be relatively simple, if one just takes out of the complaint these issues. *** That's what I think – the purpose of this may not have been done to your liking in particular. But the concept is there, that if you want specificity, then there is a way of doing it. And saying, all right, let's look at what the defendants -- the plaintiffs have alleged in their complaint and what did they prove, and then use those questions to determine whether the jury says they were proven or not.

MR. SCHNEIDER: I guess my point was this: One, we should not create a list of questions that are suggestive and argumentative, which I would submit these are.

We would submit that, with respect to specificity, the better way to go is to let the jury say what it is they've found.

T.36298-99 (June 14, 1999)

THE COURT: They [i.e., the questions included in Appendix D, *supra*] would be incorporated in the verdict form?

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: Yes. If Your Honor felt we needed specificity, because the defendants said we must have specificity, once they're going to put in two or three, that tells one footnote of the story. We wanted to have a balanced overview of the areas that we felt that were areas of fraud, misrepresentation and conspiracy. And following the complaint we prepared this list of questions that we felt covered those areas.

Not exclusively. There are many other aspects of the fraud that are not covered. But it would be – they would literally be answering for many, many hours.

We don't feel it's necessary. We think the standard instructions cover it. But if you want specificity, we tried our best to give you specificity based on the common issues that this case was certified under.

MR. HEIM [DEFENSE COUNSEL]: And Your Honor, you know, it's simply not the defendants' job to propose misrepresentations of fact for the jury to consider. That's the plaintiffs' job, not ours. That's theirs.

Now, what they have done is given you things that are not statements of fact, which are capable of being misrepresentations. They are things like Number 3, which just doesn't get you anywhere; and like Number 5: Did the chief executive officers state the following before Congress?

So what? It's supposed to be tied to a cause of action here, and the cause of action that is listed under is fraud. And fraud has a legal meaning, as we lawyers all know. And so these questions and each and every one of them –

that's why we did this – these questions just don't fit within the framework of what is required to establish fraud. And that's the only way you can do it with the jury.

* * *

To make our point as to what's wrong with all these questions, we provided Your Honor with a memorandum at the end of it, a legal memorandum, under Tab C.

THE COURT: C? Okay.

MR. HEIM: And Tab C, that legal memorandum is there to show you why these questions just don't get you anywhere. And they don't, really.

THE COURT: Okay.

R. 48499-48563: "Certain Defendants' Preliminary Draft Phase I Trial Verdict Form" (June 4, 1999)

[Reproduced at Appendix B, *supra*]

R. 49142-49172: "Outline of Plaintiffs' Proposed Phase I Verdict Form Questions And Certain Defendants' Objections And Counter-Proposals Thereto" (June 14, 1999)

[Reproduced at Appendix C, *supra*]

Brief in Opposition at 7: "Petitioners Brown & Williamson Tobacco and American Tobacco announced their preference for the verdict form that was used as a "middle ground." although they now challenge it in their due process argument. T.35969."

Brief in Opposition at 17: "Brown & Williamson Tobacco and American Tobacco preferred the special interrogatory verdict form ultimately used, rather than the more specific interrogatory questions prepared by the Class, referring to the former as a preferable 'middle ground.' T.35969."

T.35969-71 (June 11, 1999) (emphasis added)

MR. SCHNEIDER [BROWN & WILLIAMSON COUNSEL]: I guess my point was this: One, we should not create a list of questions that are suggestive and argumentative, which I would submit these are.

We would submit that, with respect to specificity, the better way to go is to let the jury say what it is they've found.

But a middle ground, Your Honor, short of a list of suggested questions, let the plaintiffs, in their closing argument, argue to the jury what it is that they think are false statements, what it is that they think were published in Florida. Let them argue, and the jury's answer to the simple question will be in response.

THE COURT: Okay. I didn't think you wanted to do that. But you mentioned that.

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: If I understand that correctly, you know, and it's just a general question, that's fine. But if it's fill in the blanks and start remembering, you know, obviously, we object to that.

My understanding of what counsel just said is there would just be a general question on fraud, like on the verdict form, without specificity.

THE COURT: That's what he said. That was my understanding.

MR. HEIM [DEFENSE COUNSEL]: If that's what he said. I don't join in it. If that's what he said.

MR. SCHNEIDER: What I said, Your Honor, was we thought the appropriate way to go is to ask this question and ask for specificity in the manner in which we have done it. Let the jury tell us specifically what they have found.

THE COURT: That's at this end of the spectrum.

MR. SCHNEIDER: That's at this end of the spectrum.

The plaintiffs have suggested, instead, a roll call of argumentative questions [referring to questions in Appendix D, *supra*]. I oppose that. I still think that our submission is the way to go. What I said was, if the Court is not going to go in our direction, I don't think they should go to the plaintiffs' direction.

And the middle direction, *which I don't support*, but the middle direction is: Ask a simple question, argue in closing what you're going to argue, and whatever use can be made of that can be made of that.

We still think the proper way to go is ask the question, let the jury specify.

Brief in Opposition at 7-8: "The petition portrays the preclusion ruling as an extraordinary event, but when petitioners thought they would prevail on the merits, in Phase I, they repeatedly acknowledged the preclusionary effect of the findings, proclaiming, '[I]f the defendants win, we want as many people as possible bound' (R.10708-10809 at 96) and if the jury answers 'no . . . then not a single Florida smoker can recover." T.36007."

R.10708-10809: Hearing on Class Notice (October 1, 1996) (Excerpt)

MR. HEIM [DEFENSE COUNSEL]: In addition to that, there are problems with the opt-out period. I mean, how long are opt-outs going to have to opt out? Would you have a second 90-day period, a second 120-day period? And by suggesting that the first period wasn't good enough, was insufficient, you would always have the argument by somebody who said they were in the first notice group, that that was palpably, on its face, insufficient.

I think you create more problems than you solve. And I think there are good reasons why a so-called graduated or whatever it is program, is something that the Court shouldn't count on. It's too important. And I want to go to the importance of it again.

I'm not being altruistic. I don't pretend to be altruistic about it. Mr. Rosenblatt is right, we're going to try the case. We expect to win the case. And when we win the case, I want to be able to say, "You're bound by it." I don't want to have thousands and thousands of people come in and say, "That notice was no good. I have the right to bring my own individual action."

And that's why this notice is so important. It's two reasons. One is that Florida residents, who have the right under the Florida constitution to bring a lawsuit, actually get to read the notice. And Ms. Kinsella says, "Oh, advertising – "

THE COURT: I've heard this argument.

MR. HEIM: I know you've had; but, Judge, I think, for the same reasons, it's terribly, vitally important. And for the second reason, because I want them bound. I want them bound in case we win.

THE COURT: I understand. That's why you objected to publication.

T. 36006-07 Hearing on Verdict Form (June 11, 1999)

THE COURT: I have a question for Mr. Kirby. You made the comment that not a single class member will ever be entitled to or recover – I'm not sure what you said – punitive damages. Let me see what you did say.

MR. KIRBY [REYNOLDS COUNSEL]: Let me go back and find it.

THE COURT: All right. You said: Not a single Florida so-called addicted, injured smoker in this class can ever recover punitive damages from any of the defendants.

MR. KIRBY: That was in the context, Your Honor, of me telling you why – Mrs. Rosenblatt said that the question we proposed [i.e., whether defendants' conduct met the standard for punitive damages] was meaningless.

THE COURT: I don't understand what you mean when you say – because of the evidence or because of some law?

MR. KIRBY: No, I thought what I said – she said the question we submitted was meaningless; that an answer to it wouldn't mean anything. And I was telling Your Honor –

THE COURT: Oh.

MR. KIRBY: – if they answer the question "No." and that is what I said.

THE COURT: No. I wanted to be sure that's what you said.

MR. KIRBY: I said: I'll tell you why, if the answer is no, then not a single Florida smoker can recover [punitive damages].

Brief in Opposition at 14: "For example, in discussing the finding of negligence, petitioners now state: 'This finding is a cipher' (Pet. at 16), but petitioners argued below that the same question was very meaningful because 'an adverse finding is very harmful to the defense . . . where the question is exactly what the trial plan says we're supposed to be trying [and] . . . it's not a happy event if that's decided against us.' T.35918-19."

T.35917-20 (June 10, 1999)

MR. HEIM [DEFENSE COUNSEL]: . . . . When the defendants ask a question like 6A [on form reproduced at Appendix B, *supra*], which is where we started here, prove that any defendant did not exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances, that's a real – that's an adverse finding there, is very harmful to the defense. That is what is known as an integral element of a cause of action, exactly what the trial plan says we're supposed to be trying. You can't try the whole cause of action; we all recognized that from the beginning.

But the trial plan talks about trying the integral elements that are common, and that's what we're trying to do. It's not a happy event if that's decided against us; it's not a happy event if they decide that there was a feasible alternative design. But those are the common questions that are integral elements of the cause of action.

And the way this case is structured, we are actually going to complete a cause of action. We're going to complete it as soon as we finish the integral elements that are common, and then goes go to Phase II, and with the very first class representative trial, do the common issues where together you at least, to the extent that it can be done, you will get to a cause of action determination.

That's what we're trying to do here. And we're working to try to make it something that we didn't invest 11

months of our life and then get to the end and say: How do we possibly use this when we're finished?

Brief in Opposition at 8, footnote 9: "Dan Webb, lead counsel for Philip Morris, argued that Philip Morris' CEO 'is going to tell you he understands your verdict very very well. He is not going to tell you he does not know what your verdict means. He is not going to tell you that at all.' T.51085"

T. 51085 (May 22, 2000) (emphasis added)

> MR. WEBB [PHILIP MORRIS COUNSEL]: ... He's [Mike Szymanczyk, Philip Morris CEO] going to tell you that – he understands – Mr. Rosenblatt – wait until he gets on the stand. He's going to tell you he understands your verdict very, very well. He's not going to tell you he doesn't know what your verdict means. He's not going to tell you that at all.
>
> He will tell you *he doesn't know what all evidence you relied upon to reach your verdict. Nobody does.*

RECORD MATERIALS RELATED TO PRESERVATION OF PREEMPTION ISSUE

Brief in Opposition at 9: "Although petitioners object to the Phase I jury instructions on preemption, which represented a combination of the litigants' submissions, class counsel twice offered to modify the instruction: 'I have volunteered to take out the language they had a problem with," (T.36285, 36152-53), but petitioners declined: "I don't think a shortened instruction . . . is an appropriate way to go.' T.36153."

T.36284-86 (June 14, 1999)

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: And we have the same objections to the last two paragraphs [of Defendants' proposed preemption charge]. It absolutely ignores the exception of deception, the obligation not to deceive, and the conspiracy, where there's no preemption that applies. It's not appropriate. It's not based upon a neutral presentation of preemption, and it would be more confusing and misleading, and it's really not necessary.

I think if they understand the failure to warn after July 1, '69 is the key – and I think that was covered in our instruction which was Engle Number 10, which you know very clearly says: Since July 1, 1969, there have been required Surgeon General warnings appearing on packages of cigarettes sold in the United States. Pursuant to federal law, you may not find any finding of liability on a determination that after July 1, 1969, one or more of these defendants should have included additional or more clearly stated warnings on their cigarette packages or in advertisements. Federal law does not limit the liability of any defendants against claims of failure to warn prior to July 1 '69. I have volunteered to take out the language they had a problem with in between [i.e., language in plaintiffs' proposed instruction; not erroneous language that

appeared in final instruction], and if you want to – this is the subject of preemption that has been mentioned sometimes during the trial. It's only been mentioned in terms of an objection. "Objection, preemption." That's the only time the jury has heard the word.

But if there's a need to describe the word, this describes it simplistically, without getting into what Congress did, what Congress didn't do, what exceptions apply, how they work here. I think this is a big mistake, and it would have to be in far more detail. And it's unnecessary.

T.36151-54 (June 14, 1999)

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: . . .All the jury needs to know is that you can't base your decision that there should have been better or different warnings after July 1, 1969. And we totally disagree, because there's a whole line of Florida law that, once you speak, once you present information, you've got to tell the whole truth. And that incorporates fraud – I've got the case with me when we come to that count, that incorporates the fraud counts in each of the counts. What I would suggest, you know, rather than start debating what's in and what's out, to simply have the instruction this way, the first few sentences: Since July 1, 1969 there have been required Surgeon General warnings appearing on packages of cigarettes sold in the United States. Pursuant to federal law, you may not base any finding of liability on a determination that after July 1, 1969, one or more of these defendants should have included additional or more clearly stated warnings on their cigarette packages or in advertisements.

Then go to the final sentence: Federal law does not limit the liability of any Defendant against claims of failure to warn prior to July 1, '69. And the other aspects

will be covered in other instructions. We prefer to have it in but, as a compromise, that would very simply explain to the jury that the first two sentences and the last sentence without the word "finally," because I was trying to have balance and say: Well, that's out, but, however, these are in. But if we take out the "these are in" aspect, I think that that's a neutral, fair way to clearly present it.

Congress shouldn't be involved. There's no prohibitions. Simply a fact that they're not to make a determination based upon post July 1, '69 failure to warn. And it's related to cigarette packages and advertisements.

That's specifically from Cipollone.

MR. MOODHE [COUNCIL FOR TOBACCO RESEARCH COUNSEL]: Your Honor, I think that in order to, for the jury to understand and properly apply this very, very important concept, which even Your Honor, I think, at times has admitted it's not an easy one, sometimes, to get a hold of. It's better on this particular subject to say more than less.

I think the defendants' instruction correctly lays out the law as we understand it, and does so in a fashion that we think will be helpful to the jury in really being able to sort through what it can and cannot do in this area. I don't think a shortened instruction on this very important concept is an appropriate way to go with this jury.

The other point I neglected to make before, and just to keep the record straight, if there's any instruction here because of the arguments I've made before regarding preemptive effects of the cigarette labeling legislation, and the fact that West wasn't adopted until 1976, at best, at most the plaintiffs can only have a negligent failure to warn claim, not a strict liability failure to warn claim.

So to that extent, the Court, I think, would be appropriate in considering the need for the type of language

that plaintiffs have proposed here vis-à-vis that more limited theory of liability on a failure to warn.

APPENDIX G

RECORD MATERIALS RELATED TO AFFIRMATIVE MISREPRESENTATION CLAIMS OF FARNAN AND DELLA VECCHIA

Mary Farnan

T.42216-17 (December 9, 1999)

PLAINTIFFS' COUNSEL. Now, in this ad that I'm going to show the jury now, it has a man and a woman. I don't know why the men always have their shirts open, but they seem to always have their shirts open in these ads. And the ads says -- both the man and woman are apparently saying, "We want low tar." Well, what did that convey to you? Why did people want low tow?

MARY FARNAN. It was safer. Much safer.

Q. To you, low tar meant it was safer than more tar?

MR. JOHNSON: Objection. Leading, Your Honor.

THE COURT: It is leading. Rephrase.

BY [PLAINTIFFS' COUNSEL]:

Q. What did low tar mean to you, as you saw these various ads stressing low tar in your mind? What was the difference between low tar and higher tar?

A. Low tar would be safer because it didn't have -- it would be less impurities.

T.42221 (December 9, 1999)

PLAINTIFFS' COUNSEL: ... And the ad says -- both the man and the woman are apparently saying, 'We want low tar.' Well, what did that convey to you? Why did people want low tar.

MARY FARNAN: It was safer. Much safer. ...

Q: What did low tar mean to you as you saw these various ads stressing low tar in your mind? What was the difference between low tar and higher tar?

A: Low tar would be safer because it didn't have -- it would be less impurities.

***

Q: ... Oh, by the way, what did the word mean to you when you would see an ad not only saying low tar, but ultra low tar? What did ultra low tar mean to you?

A: I would think it would be even safer because it would have less tar.

T.42223-24 (December 9, 1999)

PLAINTIFFS' COUNSEL. Discover Camel Lights. When you would see an ad, Mrs. Farnan, and the word "light" was in the ad, what did that mean to you?

MARY FARNAN. To me, that meant it was a safer cigarette because it had less impurities in it. It had less tar.

They always put the numbers up there, too, you know; that they were, you know, less, 9 milligrams, 5 milligrams.

T.42239-42 (December 9, 1999)

PLAINTIFFS' COUNSEL: [I]n reviewing the ads we have been over today, in thinking about the ads that you have seen over the years, '60s, '70s, '80s, early on, tell me in your mind what effect these ads had on you individually, did the ads portray smoking as something that was essentially safe or unsafe?

MARY FARNAN: I thought they were safe.

Q: Healthy or unhealthy?

A: I didn't see anything unhealthy at all about them.

Q: Did you ever, ever in your life, see a cigarette ad where one of the models was -- either a man or woman was either elderly or infirm or disabled in any way?

A: No, sir

T.42383-84 (December 10, 1999)

MICHAEL SIEGEL (PLAINTIFFS' EXPERT WITNESS): I think the advertising had -- really had two major impacts on [Mary Farnan]. First of all, I think the advertising convinced her that cigarette smoking was safe, and that despite the fact that she had heard information from health -- public health officials, and maybe she had seen those warnings, occasionally saying the cigarette smoking is harmful, I think the advertising basically convinced her that that wasn't true; that they are actually a safe product. And I think they convinced her specifically that low-tar, low nicotine would be a safe product.

And the second effect I think it had on her is that I think that whereas without the advertising, she may have been swayed by the fact that she heard that cigarette smoking was harmful. Because she was exposed to the advertising telling her, suggesting to her that it was safe, I think it didn't allow that to sway her, and therefore, she continued to smoke.

Angie Della Vecchia

T.43759-60 (January 25, 2000)

MICHAEL SIEGEL (PLAINTIFFS' EXPERT WITNESS): My opinion is that cigarette advertising played a major contributing role to Mrs. Della Vecchia's starting

to smoke at age 11; to her continuing to smoke about a pack a day for the first 20 years; for her switching to a different brand of cigarettes in the 1970s, rather than quitting smoking; and in her continuing to smoke for an additional 20 years, until she finally quit at the time of her lung cancer.

T.43948-49 (January 31, 2000)

PLAINTIFFS' COUNSEL. Now, when Angie was unable to successfully quit with you in 1977, did she continue to smoke the unfiltered Pall Malls?

RALPH DELLA VECCHIA. No, I had asked her, I said, "If you couldn't stop, at least, hon, try and take a filtered cigarette." And she chose Winston Light 100s.

Q. Why did you make that recommendation to her? What did you believe about the lights over the Pall Malls?

A. Well, I thought the lights at that time, or whatever, were better than an unfiltered cigarette.

Q. Based on what? Why did you think that?

A. Less nicotine and tar.

Q. Which meant what to you?

A. Well, be safer for her.

T.44269-70 (February 2, 2000)

ANGIE DELLA VECCHIA (BY VIDEOTAPE). My husband and I thought we should quit. We knew it was -- now we know it's not good for you. And he did; he quit. And I tried, but -- maybe a couple hours, and I lit up. And my husband said, "Well, if you're going to smoke,

please, please, smoke a filter." So that's what I did. I went to a light and a filter cigarette.

PLAINTIFFS' COUNSEL. What brand?

A. Winston Light 100s.

Q. What was the reason for switching to the Winston Light 100s?

A. Well, because they said they were light, I mean, I would -- I thought: Well, that's better than full strength of nicotine and tar and -- you know, they said it was lower in tar, so I thought it was better for my health, so I didn't smoke a nonfilter anymore.

Q. When you said "they said" it was light, who are you referring to?

A. The commercials for cigarettes, the advertisements in the newspaper.

APPENDIX H

T. 50236-50 (Phase II-A Jury Charge, April 5, 2000) (Excerpts) (emphasis added)

THE COURT: . . . . The issues that you determined in Phase I were not relitigated in Phase II; therefore you will now have to determine whether defendants' conduct *upon which you based your Phase I verdict* was the legal cause of injury to Mary Farnan . . . and Angie Della Vecchia.

* * *

In Phase I of this trial, you determined that the defendant made a false statement of material fact, either knowing the statement was false or being without knowledge as to its truth or falsity, with the intention of misleading smokers.

In Phase II of this trial, you must now determine the following:

First, whether Mary Farnan . . . and/or Angie Della Vecchia were aware of any false statement of material fact *which formed the basis of your verdict in Phase I . . .*

* * *

In Phase I of this trial, you determined that defendants concealed or omitted certain material information, not otherwise known or available, knowing the material was false or misleading, or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes.

In Phase II of this trial, you must determine the following:

Whether any such concealment or omission of material information concerning the health effects and/or addictive nature of smoking cigarettes, *as determined in Phase I*, was the legal cause of injury to Mary Farnan . . . and/or Angie Della Vecchia.

APPENDIX I

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA (22)

HOWARD A. ENGLE, M.D., et al.,

Plaintiffs,

v.

RJ REYNOLDS TOBACCO COMPANY, et al.,

Defendants.
_____/

FILED
APR 07 2000
CLERK, CIRCUIT & COUNTY COURTS

VERDICT FORM FOR PHASE II

We, the Jury, return the following Verdict:

Question No. 1

[Legal Causation]

In your verdict of July 7, 1999, you found that smoking cigarettes causes some diseases including lung cancer and laryngeal (throat) cancer.

Was smoking cigarettes a legal cause of Mary Farnan's lung cancer?

Yes ✓ No_____

Was smoking cigarettes a legal cause of Frank Amodeo's laryngeal (throat) cancer?

Yes ✓ No_____

Was smoking cigarettes a legal cause of Angie Della Vecchia's lung cancer and death?

Yes ✓ No_____

If your answer as to one or more of the Class Representatives, above, is "No", your verdict is for the Defendants as to that Class Representative and you should not answer any further questions as to that Class Representative. If you answered "No" to Question No. 1 for all three Class Representatives, you do not need to answer any further questions. Please sign and date the last page. If you answered "Yes" as to one or more of the Class Representatives, please answer the following questions as to that or those Class Representatives.

W0503300

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Question No.2

[Strict Liability]

You found in your Verdict of July 7, 1999 that each of the Defendant tobacco companies placed cigarettes on the market that were defective and unreasonably dangerous, both before and after July 1, 1974 (except for Brooke whose liability is limited to after July 1, 1974).

Were defective and unreasonably dangerous cigarettes placed on the market by one or more of the Defendant tobacco companies a legal cause of damage to Class Representatives Mary Farnan, and/or Frank Amodeo and/or a legal cause of death to Angie Della Vecchia, deceased?

Please answer "Yes" or "No" as to each Class Representative below.

a. Mary Farnan

Philip Morris, Incorporated	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____
Liggett Group Inc.	Yes ✓	No ____
Brooke Group Holding Inc.	Yes ✓	No ____

b. Frank Amodeo

Philip Morris, Incorporated	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____
Liggett Group Inc.	Yes ✓	No ____
Brooke Group Holding Inc.	Yes ✓	No ____

WWSC33301

c. **Estate of Angie Della Vecchia, deceased**

Philip Morris, Incorporated	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____
Liggett Group Inc.	Yes ✓	No ____
Brooke Group Holding Inc.	Yes ✓	No ____

Question No. 3

[Fraud and Misrepresentation]

In your July 7, 1999 Verdict you found that each of the Defendants made a false statement of a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity with the intention of misleading smokers, both before and after May 5, 1982 (except for Brooke, whose liability is limited to after May 5, 1982).

Did Class Representatives Mary Farnan, Frank Amodeo and/or Angie Della Vecchia, deceased rely on a false statement(s) of material fact that was a legal cause of damage or death to that Class Representative?

Please answer "Yes" or "No" as indicated below.

Mary Farnan

Philip Morris, Incorporated		
before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
RJ Reynolds Tobacco Company		
before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company		
before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

W0503302

Lorillard Tobacco Company/Lorillard, Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Liggett Group Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Brooke Group Holding Inc.
after May 5, 1982 — Yes ✓ No ____

Council for Tobacco Research
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Tobacco Institute
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Frank Amodeo

Philip Morris, Incorporated
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

RJ Reynolds Tobacco Company
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Lorillard Tobacco Company/Lorillard, Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

WD5033303

Liggett Group Inc.

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Brooke Group Holding Inc.

after May 5, 1982	Yes ✓	No ____

Council for Tobacco Research

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Tobacco Institute

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Angie Della Vecchia, deceased

Philip Morris, Incorporated

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

RJ Reynolds Tobacco Company

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Lorillard Tobacco Company/Lorillard, Inc.

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Liggett Group Inc.

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Brooke Group Holding Inc.

after May 5, 1982	Yes ✓	No ____

WI0503304

Council for Tobacco Research

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Tobacco Institute

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____

Question No. 4.

[Fraud by Concealment]

In your Verdict of July 7, 1999 you found that each of the Defendants concealed or omitted material information, not otherwise known or available, knowing the material was false and misleading, or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes, both before and after May 5, 1982 (except for Brooke, whose liability is limited to after May 5, 1982).

As to each of the Defendants, was that Defendant's concealment or omission a legal cause of injury to Class Representatives Mary Farnan, and/or Frank Amodeo and/or Angie Della Vecchia, deceased?

Please answer "Yes" or "No" as indicated below.

Mary Farnan

Philip Morris, Incorporated

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____

RJ Reynolds Tobacco Company

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____

Brown & Williamson Tobacco Corporation, Individually and as successor by merger to the American Tobacco Company

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____

Lorillard Tobacco Company/Lorillard, Inc.

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____

WV05033305

Liggett Group Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Brooke Group Holing Inc.
after May 5, 1982 — Yes ✓ No ____

Council for Tobacco Research
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Tobacco Institute
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Frank Amodeo

Philip Morris, Incorporated
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

RJ Reynolds Tobacco Company
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Lorillard Tobacco Company/Lorillard, Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Liggett Group Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Brooke Group Holding Inc.
after May 5, 1982 — Yes ✓ No ____

WI0503306

Council for Tobacco Research
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Tobacco Institute
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Angie Della Vecchia, deceased

Philip Morris, Incorporated
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

RJ Reynolds Tobacco Company
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Lorillard Tobacco Company/Lorillard, Inc.
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Liggett Group Inc.
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Brooke Group Holding Inc.
after May 5, 1982 Yes ✓ No ____

Council for Tobacco Research
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

WI0503307

Tobacco Institute

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Question No. 5

[Civil Conspiracy-Misrepresentation]

In your Verdict of July 7, 1999 you found that all of the Defendants entered into an agreement to misrepresent information relating to the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment.

As to each of the Class Representatives below, was his or her injury legally caused by acts done in furtherance of an agreement among two or more defendants to commit an act of fraud or misrepresentation, as found in Phase One? Please answer "Yes" or "No" with reference to the periods of time before and after May 5, 1982.

Mary Farnan

Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Frank Amodeo

Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Angie Della Vecchia, deceased

Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Question No. 6.

[Civil Conspiracy-Concealment]

In your Verdict of July 7, 1999 you found that all of the Defendants entered into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment.

As to each of the Class Representatives below, was his or her injury legally caused by acts done before or after May 5, 1982 in furtherance of an agreement among two or more of the defendants to commit an act of omission or concealment? Please answer "Yes" or "No" with reference to the periods of time before and after May 5, 1982.

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Mary Farnan
Before May 5, 1982 — Yes ____ No ____
After May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Frank Amodeo
Before May 5, 1982 — Yes ____ No ____
After May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Angie Della Vecchia, deceased
Before May 5, 1982 — Yes ____ No ____
After May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Question No. 7.

[Breach of Implied Warranty]

In your Verdict of July 7, 1999, you found that each of the Defendant Tobacco Companies sold or supplied cigarettes that were defective in that they were not reasonably fit for the uses intended, both before and after July 1, 1974 (except for Brooke whose liability is limited to after July 1, 1974).

As to each of the Defendants, below, please state whether the sale or supply of defective cigarettes was a legal cause of damage to Class Representatives Mary Farnan and/or Frank Amodeo and/or was a legal cause of death to Angie Della Vecchia, deceased.

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated

Mary Farnan — Yes ✓ No ____
Frank Amodeo — Yes ✓ No ____
Angie Della Vecchia, deceased — Yes ✓ No ____

RJ Reynolds Tobacco Company

Mary Farnan — Yes ✓ No ____
Frank Amodeo — Yes ✓ No ____
Angie Della Vecchia, deceased — Yes ✓ No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company

Mary Farnan — Yes ✓ No ____
Frank Amodeo — Yes ✓ No ____
Angie Della Vecchia, deceased — Yes ✓ No ____

WD5033309

Lorillard Tobacco Company/Lorillard, Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Liggett Group Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Brooke Group Holding Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Question No. 8.

[Breach of Express Warranty]

In your Verdict of July 7, 1999, you found that each of the Defendant tobacco companies sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said Defendant(s), either orally or in writing, both before and after July 1, 1974 (except for Brooke whose liability is limited to after July 1, 1974).

As to each of the Defendants, below, was that Defendant's breach of express warranty a legal cause of damage to Class RepresentativesMary Farnan and/or Frank Amodeo and/or a legal cause of death to Angie Della Vecchia, deceased?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

RJ Reynolds Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

W05033310

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Lorillard Tobacco Company/Lorillard, Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Liggett Group Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Brooke Group Holding Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Question No. 9.

[Negligence]

In your Verdict of July 7, 1999, you found that all of the Defendant Tobacco Companies failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances, both before and after July 1, 1969 (except for Brooke whose liability is limited to after July 1, 1969).

As to each of the Defendants, below, please state whether that Defendant's negligence was a legal cause of damage to Class Representatives Mary Farnan and/or Frank Amodeo and/or a legal cause of death to Angie Della Vecchia, deceased.

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

W0503311

RJ Reynolds Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Lorillard Tobacco Company/Lorillard, Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Liggett Group Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Brooke Group Holding Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Question No. 10

[Intentional Infliction of Emotional Distress]

In your Verdict of July 7, 1999, you found that the Plaintiffs had proven that all of the Defendant Tobacco Companies engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress.

As to each of the Defendants below, please state whether that Defendant's extreme and outrageous conduct was a legal cause of injury to Class Representatives Mary Farnan and/or Frank Amodeo.

Please answer "Yes" or "No" as to each Defendant, below:

WS0033312

Philip Morris, Incorporated

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

RJ Reynolds Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

Brown & Williamson Tobacco Corporation, Individually and as successor by merger to the American Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

Lorillard Tobacco Company/Lorillard, Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

Liggett Group Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

Brooke Group Holding Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

Question No. 11

[Statute of Limitations]

a. Did Frank Amodeo know, or should he have known, on or before May 5, 1990, in the exercise of reasonable care that he was addicted to smoking?

Yes ✓ No ____

b. Did Frank Amodeo know, or should he have known, on or before May 5, 1990, in the exercise of reasonable care that he had cancer and that there was a reasonable possibility that his cancer was caused by cigarette smoking?

Yes ✓ No ____

WD5033313

Question No. 12

[Comparative Fault]

If your answer to Question Nos. 2, 7, 8 and/or 9 as to one or more of the Class Representatives was "Yes" as to any Defendant, please answer the following questions relating to that Class Representative.

a. Was there fault on the part of one or more of the Class Representatives that was a legal cause of his or her damage?

Please answer "Yes" or "No" as to each Class Representative, below:

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, Deceased	Yes ✓	No ____

b. State the percentage of any fault which was a legal cause of damage to Class Representative Mary Farnan, that you charge to:

Philip Morris, Incorporated	5 %
RJ Reynolds Tobacco Company	60 %
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	20 %
Lorillard Tobacco Company/Lorillard, Inc.	5 %
Liggett Group Inc.	0 %
Brooke Group Holding Inc.	0 %
Mary Farnan	20 %
TOTAL MUST BE	100%

c. State the percentage of any fault which was a legal cause of damage to Class Representative Frank Amodeo that you charge to:

Philip Morris, Incorporated	20 %
RJ Reynolds Tobacco Company	5 %
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	30 %

WD5033314

Lorillard Tobacco Company/Lorillard, Inc.	0 %
Liggett Group Inc.	0 %
Brooke Group Holding Inc.	0 %
Frank Amodeo	25 %
TOTAL MUST BE	**100%**

d. State the percentage of any fault which was a legal cause of damage to **Angie Della Vecchia, Deceased** that you charge to:

Philip Morris, Incorporated	0 %
RJ Reynolds Tobacco Company	50 %
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	35 %
Lorillard Tobacco Company/Lorillard, Inc.	0 %
Liggett Group Inc.	0 %
Brooke Group Holding Inc.	0 %
Angie Della Vecchia, Deceased	15 %
TOTAL MUST BE	**100%**

Your answers to Question 12(b)(c) and (d) must each total 100%, and should include a zero for any Defendant or Class Representative you found not at fault.

If you answered "No" as to all Class Representatives and all Defendants in Questions 2 through 10, then your verdict is for the Defendants and you should not continue any further except to sign and date the Verdict Form. If you answered "Yes" as to any Class Representative against any Defendant, in any of Questions 2 through 10, please answer Question Nos. 13 and 14 as it pertains to that or those Class Representatives.

W0503315

Question No. 13

[Damages]

a. **What is the total amount of damages sustained by Class Representative Mary Farnan?**

1. **ECONOMIC DAMAGES** [including medical expense, hospitalization, medical care in the past or to be obtained in the future; lost earnings and lost ability to earn money in the future; loss of ability to earn money in the past and in the future; and loss of household services]

a.$ 1,250,000

2. **INTANGIBLE DAMAGES** [damages incurred in the past or that will be experienced in the future, including bodily injuries, pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience and loss of capacity of the enjoyment of life]

b.$ 1,600,000

Total damages of Class Representative Mary Farnan
TOTAL (add lines a & b) $ 2,850,000

b. **What is the total amount of damages sustained by Class Representative Frank Amodeo?**

1. **ECONOMIC DAMAGES** [including medical expense, hospitalization, medical and nursing care in the past or to be obtained in the future; lost earnings and lost ability to earn money in the future; loss of ability to earn money in the past and in the future; and loss of household services]

a.$ 2,081,000

2. **INTANGIBLE DAMAGES** [damages incurred in the past or that will be experienced in the future, including bodily injuries, pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience and loss of capacity of the enjoyment of life]

b.$ 3,750,000

Total damages of Class Representative Frank Amodeo:
TOTAL (add lines a & b) $ 5,831,000

W0503316

Question No. 14

What is the total amount of damages sustained by the Estate of Angie Della Vecchia, deceased, and the statutory survivors, her husband Ralph Della Vecchia and her minor son James?

RALPH DELLA VECCHIA [loss of companionship, loss of protection, and mental pain and suffering, in the past and in the future]

a.$ 1,500,000

JAMES DELLA VECCHIA [loss of parental companionship, instruction, guidance and mental pain and suffering, in the past and in the future]

b.$ 2,000,000

THE ESTATE OF ANGIE DELLA VECCHIA [funeral expenses, medical and hospital expenses and loss of household services]

c.$ 523,000

TOTAL (add lines a ,b & c) $ 4,023,000

In determining the total amount of damages, do not make any reduction because of the comparative fault, if any, of Class Representatives Mary Faman, Frank Amodeo and/or Angie Della Vecchia, deceased. If you found one or more of the Class Representatives at fault to any degree, the Court in entering Judgment will reduce that Class Representative's total amount of damages (100%) by the percentage of fault which you found as chargeable to the Class Representative or decedent.

SO SAY WE ALL, this 7th day of April, 2000.

WV05C3331/

APPENDIX J

COMBINED INITIAL BRIEF OF ALL APPELLANTS OTHER THAN LIGGETT AND BROOKE, No. 3D00-3400 (Fla. App. 3 Dist. filed Nov. 26, 2001) (Excerpt)

V. FEDERAL STATUTES, THE FIRST AMENDMENT, AND FLORIDA LAW BARRED KEY ELEMENTS OF PLAINTIFFS' CLAIMS DURING ALL PHASES OF THE TRIAL

B. Plaintiffs' Attacks On Cigarette Advertising And Promotion Were Barred By The FCLAA, The First Amendment, And Florida Law

1. The FCLAA Preempted Attacks On Cigarette Advertising And Promotion

The Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331 *et seq.*, requires cigarette makers to place specific warning labels on all cigarette packages and advertising. Furthermore, it prohibits states from requiring different or additional warnings or imposing any other health-based regulations on cigarette advertising and promotion. The Act's explicit "preemption clause" provides:

> *No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes* the packages of which are labeled in conformity with the provisions of this act.

15 U.S.C. § 1334(b) (emphasis added).[1] The U.S. Supreme Court has held that the FCLAA's preemption clause extends

[1] The FCLAA's preemption clause became effective on July 1, 1969. *See* Pub. L. 91-222, § 3. For convenience, periods or events after that date will be described in this context as "post-1969."

to private actions by smokers. Thus, smokers may not recover damages by asserting that cigarette advertising and promotion are subject to any health-based common-law restrictions. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-23 (1992) (the FCLAA prohibits state-law suits for damages as well as legislative enactments).

The trial court reacted to preemption under the FCLAA with hostility and confusion:

> To be perfectly honest with you, with all due deference to all of that [the FCLAA], nobody, when they talked about preemption and warnings, had any concept at all about the advances in science, *and so the preemption doesn't apply to modern science and what's happening today.*
>
> *So many things happen today that they [smokers] should be warned about and the government says: Hey, it's enough.* They're doing a tremendous disservice to the public by not allowing warnings, enhancement of warnings, and telling them exactly what's going on.
>
> And to me, I mean *that just . . .*
>
> *[b]oils my blood and boggles my mind.*
>
> . . .
>
> It makes litigation impossible. And this is -- and truth and justice impossible. That's where the problem comes in.
>
> Now, we've got to work around it. *Now, I have to figure out how to get around it, thank you very much, preemption. . . .*

It's so ridiculous. It's really nonsense. (T. 16621-23, emphasis added.)

* * *

I have so much trouble . . . intellectually accepting that concept [preemption]. . . . *Because it is flat-out so wrong in my opinion . . . with all due respect for the Supreme Court.* (T. 32623, emphasis added.)[2]

In its rulings on evidence and instructions, the trial court repeatedly "got around" preemption. Throughout the trial, the court allowed plaintiffs to attack defendants' advertising and promotion on the asserted grounds that defendants had thereby: (1) neutralized package warning labels, (2) failed to provide adequate information about the dangers of smoking, (3) made smoking appear attractive to youth, and (4) improperly aimed cigarette advertising and promotion at African-Americans, other minorities, and women. All such claims were preempted by the FCLAA.

"Neutralization." Plaintiffs asserted in Phase I that defendants' post-1969 cigarette advertising and promotion made smoking seem glamorous and attractive, thereby "neutralizing" the federal warnings and undermining smokers' awareness and appreciation of the risks. (See, e.g., T. 33946-47, 34333-36.) In Phase II-A, plaintiffs repeated such assertions with specific reference to the three named plaintiffs in that phase. (See, e.g., T. 42225-26, 42239, 42363-70, 42383-

[2] This was not the only instance in which the court expressed hostility towards basic legal doctrines. For example, it failed to give proper effect to Florida's hearsay law. (E.g., T. 27590-94, 37648-49.) The court declared that Florida's rules were "crazy" (T. 11481); "we're just pulling the wool over people's eyes and we're hiding the truth" (T. 11484); and the Florida Legislature "goofed" when it enacted the rules (T. 11489). The court even suggested that the hearsay rules "may not be applicable all the time for certain cases." (T. 11480.)

408, 43769-70; R. 242: 54724-841.) Defendants consistently objected that plaintiffs' "neutralization" claims violated the FCLAA; the court overruled their objections. (T. 42304-14, 42363-64, 42383-84, 42394-408, 43719-37, 43755-58, 43769.)

The court's rulings were erroneous. In *Cipollone*, the U.S. Supreme Court held that the FCLAA preempts claims that post-1969 advertising "neutralized" or undermined the federal warnings. Thus, smokers are barred from asserting that advertising "associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness . . . [or] suggest[ed] that smoking is an activity at least consistent with physical health and well-being." 505 U.S. at 527-28; *see also Da Silva v. American Tobacco Co.*, 667 N.Y.S.2d 653, 656 (N.Y. Sup. Ct. 1997); *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 440 (Tex. 1997).

Failure to provide additional information. Plaintiffs asserted in Phase I that, after 1969, defendants had wrongfully failed to provide information about the risks of smoking, beyond the requirements of federal law. (E.g., T. 12185-89, 13464-91, 16400-01, 18709-15, 27957-58, 28888-89, 29263-64, 32621-22.) In Phase II-A, Mr. Amodeo and Ms. Farnan testified about their lack of information both before and after 1969. (T. 40247-51, 41365-75, 41438-42, 42217-18.) In addition, plaintiffs asserted that Philip Morris had acted wrongfully, after purchasing certain brands from Liggett, by removing Liggett's supposedly superior warnings and replacing them with warnings that fully complied with the FCLAA. (E.g., T. 54031-32.) The court repeatedly overruled defendants' objections that such assertions were preempted. (R. 276: 62399-400; T. 12020-21, 12186-89, 16400, 18708-18, 27957-58, 28882-86, 29263, 32622-26, 40249-50, 41373-75, 41438-42.)

Again, the court's rulings were erroneous. In *Cipollone*, the Supreme Court held that the FCLAA bars claims that cigarette makers should have provided information about

the risks of smoking beyond the requirements of federal law. 505 U.S. at 521-23; *see also Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 603 (App. Div. 1998) ("the [FCLAA] preempts all claims by consumers that the tobacco companies failed to disclose information to the public beyond what was required by federal law"), *aff'd*, 720 N.E.2d 892 (N.Y. 1999).[3]

"Youth marketing." Plaintiffs also attacked defendants' advertising as appealing and attractive to youth. (E.g., T. 16360-61, 16384-87.) Defendants objected to plaintiffs' "youth marketing" claims as preempted by the FCLAA. (E.g., T. 17589-605, R: 178: 41367-413.) The court initially agreed that such claims were preempted. (T. 5165.) Indeed, the court cut off jury voir dire on this issue because it could not "conceive of how you're going to get teenage smoking into this case if you're going to have a preemption on advertising." (T. 5165.) However, the court later changed its mind and, over defendants' objections, allowed plaintiffs to make "youth marketing" claims throughout the trial. (E.g., T. 10480, 10915-16, 11376-77, 13453, 15882-87, 16871-81, 16900, 17131-54, 17210, 17263-65, 24296-331, 51683; R. 189: 43567-97; R. 205: 47096-99; R.206: 47320-30, 47410-11.)

For example, plaintiffs' first witness in Phase I told the jury that sexy models in advertising have an impact on 13-, 14-, or 15-year olds who think smoking looks cool. (T. 11376-77.) Another witness testified that one out of three children start smoking because of advertising. (T. 13453.) Another witness testified that cigarette advertising is "an important influence in adolescent smoking initiation," because

[3] The FCLAA prohibits such claims even where, as here, plaintiffs couch them in the language of "fraudulent concealment" rather than "failure to warn." *See, e.g., Glassner v. R. J. Reynolds Tobacco Co.*, 223 F.3d 343, 349 (6th Cir. 2000); *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996); *American Tobacco v. Grinnell*, 951 S.W.2d at 439-40.

"advertising portrays these very attractive images of what it's like to be a smoker," using "attractive," "healthy," "vigorous" people who seem to be having fun. (T. 17210, 17264-65; see also T. 11377-78.) Plaintiffs' counsel then made "youth marketing" a focal point of his closing arguments in both Phase I and Phase II-B, urging the jury to punish defendants because cigarette advertising had an attractive effect on youth. (E.g., T. 37508, 57149-57, 57177.)

The trial court's decision to allow plaintiffs' "youth marketing" claims was plainly erroneous. In *Lorillard v. Reilly*, 121 S. Ct. at 2430, the Supreme Court confirmed that the FCLAA bars assertions that cigarette advertising is wrongful because it may appeal to youth. The Court stated: "Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, *even with respect to youth*." *Id.* (emphasis added). Regulation of the entire area is committed exclusively to the federal government:

> In the 1969 amendments [to the FCLAA], Congress not only enhanced its scheme to warn the public about the hazards of cigarette smoking, but also sought to protect the public, *including youth*, from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. And to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC.
>
> * * *
>
> [W]e fail to see how the FCLAA and its pre-emption provision permit a distinction be-

> tween the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legislative solution for those very concerns.

Id. at 2418-19 (emphasis added). *Reilly* confirms that the trial court's position on "youth marketing" was legally erroneous. The resulting prejudice to defendants is manifest.

Marketing to minorities and women. Plaintiffs also asserted that defendants' post-1969 advertising was wrongful because it appealed to African-Americans, other minority groups, and women. (Many of plaintiffs' racial arguments have already been discussed in Point II.A above.) For example, one of plaintiffs' witnesses charged that defendants' advertising had "perpetuated" the "racial segregation" of America through the 1970's and 1980's. (T. 17034-35.)

The court erroneously admitted plaintiffs' "minority marketing" evidence over defendants' objections. (T. 11729-32, 16871-81, 16907-09, 17113-19.) The court ultimately ruled that "minority marketing" was relevant not because it was an element of any cause of action in the case, but because "the industry had steadfastly denied" engaging in such marketing, and therefore it was relevant to defendants' "credibility." (R. 206: 47410-11.) The court thus ignored the fact that defendants had *never denied* engaging in marketing to minorities. In fact, defendants had freely acknowledged that they tailored their advertising to minorities, women, and other segments of the adult consuming public. (T. 15867, 18464, 33835.) The evidence showed that this was a common and accepted practice among consumer-products industries. (T. 33794-95, 33829-35, 33839-40.) The court's conclusion also ran afoul of the settled rule that a party cannot elicit an opponent's statement on a collateral matter and then introduce contradictory evidence to impeach the opponent's

credibility. *See, e.g., Gelabert v. State*, 407 So. 2d 1007 (Fla. 5th DCA 1981).

In any event, the FCLAA preempts claims that advertising appealed to minorities and women, just as it preempts claims that advertising appealed to youth. *Cf. Lorillard v. Reilly*, 121 S. Ct. at 2430; *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 798 (3d Cir. 2001) (FCLAA preempted claims that cigarette advertising improperly "targeted" African-Americans). The court's refusal to bar all such claims was reversible error.

Punitive damages. Plaintiffs told the jury that defendants' advertising warranted punitive as well as compensatory damages. Theatrically displaying (again) samples of defendants' advertising, plaintiffs' counsel urged the jury to return an astronomical punitive award on the ground that such advertising was attractive to youth, minorities, and women. (E.g., T. 57093-95, 57106-16, 57149-57, 57177; see also T. 51901-07.) Defendants argued that such assertions with respect to punitive damages were preempted by the FCLAA. (T. 51873, 51889-90; R. 285: 64368-71.) The court ruled that FCLAA preemption was irrelevant to punitive damages and therefore refused to apply preemption *at all* in Phase II-B. (R. 276: 62399-400.)

The court's ruling was patently erroneous. Like liability and compensatory damages, *see Cipollone*, 505 U.S. at 521, punitive damages function as a regulation or prohibition of the conduct that is punished. Indeed, a basic purpose of punitive damages is *deterrence* -- the regulation of behavior.[4] By failing to apply the FCLAA in Phase II-B, the court left the jury free to punish and hence regulate advertising and

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[4] *See, e.g., W.R. Grace*, 638 So. 2d at 504 (deterring misconduct is a primary function of punitive damages); *St. Regis Paper*, 428 So. 2d at 248; *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 621 (7th Cir. 2000) (deterrence "is a principal justification of punitive damages"), *cert. denied*, 121 S. Ct. 1099 (2001).

promotional activity that was subject solely to -- and fully compliant with -- federal regulation.

Erroneous jury instructions. In some cases, jury instructions may cure the error of admitting evidence barred by the FCLAA. *See Carter v. Brown & Williamson*, 778 So. 2d at 941-42. In this case, however, there was no such cure. To the contrary, the court's jury instructions only made matters worse.

At the close of Phase I, defendants requested an instruction that correctly stated the effect of the FCLAA, including the following:

> Congress also provided that, as long as the packs of cigarettes bear the federally mandated warning, cigarette advertising, from July 1, 1969, forward cannot be the subject of any claim that the advertising *undermined or neutralized* the warnings or made them less effective . . . . The plaintiffs have also claimed that defendants' advertisements and promotions were intended to encourage *young people, members of ethnic minority groups, or others* to start smoking. . . . . I hereby instruct you to ignore any such claims or suggestions or evidence regarding any of these activities after July 1, 1969. (R. 214: 49274-75, emphasis added.)

The court rejected defendants' request. Instead, it gave an instruction that misstated the law, contradicted itself, and said nothing about neutralization or about marketing to youth, minorities, or women:

> [P]ursuant to federal law, you may not base any finding of liability on a determination that after July 1 of 1969, one or more of these defendants should have included additional or more clearly stated warnings on their cigarette

> packages or in their advertisements. *However, federal law does not limit the liability of any defendant against claims based on negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy.* (T. 37569-70, emphasis added.)

The court's instruction was erroneous. There are no hard-and-fast categories of claims to which the FCLAA does or does not apply. *Cipollone*, 505 U.S. at 523. Plaintiffs cannot evade preemption by re-labeling their claims. The central question remains "whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" *Id.* at 524; *see also Lacey v. Lorillard Tobacco Co.*, 956 F. Supp. 956, 963 (N.D. Ala. 1997) ("Regardless of the label attached to it, a plaintiff's claim based upon an alleged duty of defendants to provide to consumers more information regarding smoking and health than is required by the Labeling Act is preempted").

Under that test, the categories of claims that the court excluded from preemption -- "negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy" -- were subject to preemption to the same extent as plaintiffs' other claims. The court's instruction improperly allowed plaintiffs to sidestep preemption by re-labeling their attacks on cigarette advertising and promotion as "negligence," or "fraud," or the marketing of a "defective product." *See, e.g., Glassner*, 223 F.3d at 349; *Allgood*, 80 F.3d at 171; *American Tobacco v. Grinnell*, 951 S.W.2d at 439-40.

In addition, the court's instruction was prejudicially confusing. The italicized sentence in the instruction quoted above took away from defendants what the immediately preceding sentence had given. The instruction was erroneous for that reason alone. *See Jacobs*, 766 So. 2d at 1180; *Gonzalez*, 752 So. 2d at 39.

The court repeated and amplified its error in subsequent phases of the trial. In its Phase II-A instruction, the court again told the jury that preemption has no application to claims for "negligence, strict liability, express warranty, fraud and misrepresentation, or conspiracy." (T. 50253-54.) Furthermore, the Phase I instruction had already inflicted prejudice that *could not be cured* in subsequent phases. In Phase II-A, the jury was required simply to apply its general Phase I verdict concerning defendants' conduct to the particular circumstances of the three individual plaintiffs. (T. 50236.) And in Phase II-B, the court refused to give any preemption instruction at all. (R. 285: 64368-71; R. 287: 64650-64; see also T. 56617-20.) Thus, the damage done in Phase I was perpetuated and irreparable.

APPENDIX K

BRIEF ON THE MERITS OF ALL RESPONDENTS OTHER THAN LIGGETT AND BROOKE, No. SC03-1856 (Fla. filed July 16, 2004) (Excerpt)

II. The Third District Correctly Invalidated The Trial Plan

C. The Verdict Was Improperly Generalized

The Third District identified yet another trial-plan defect: "[T]here were no specific findings as to any act by any defendant at any period of time. The trial plan enabled the plaintiffs to try fifty years of alleged misconduct that they never would have been able to introduce in an individual trial, which was untethered to any individual plaintiff." 853 So. 2d at 467 n.48. In Phase I, plaintiffs "stitch[ed] together" a "fictional composite" -- a generalized, "perfect plaintiff" -- supplanting all real class members, whose knowledge, conduct, and other circumstances varied crucially. Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 344-45 (4th Cir. 1998). This fictional smoker knew nothing about the risks of smoking, relied on every alleged misstatement or omission over the course of nearly half a century, smoked every cigarette brand sold at any time during that period, and developed every disease attributable to smoking. Use of generalized "findings" based on such evidence, for any purpose, violates not only Florida's class-action rules (see Point I above) but also Florida tort law and state and federal due process.

Moreover, the generalized verdict is useless in the trial plan's final phase -- the necessary Phase III trials of individual class members' claims before separate juries. No Phase III jury (or judge) can identify whatever misstatement(s) or omission(s) the Phase I jury found to be unlawful. Thus, the trial plan violates due process by allowing boundless "re-examination" of the Phase I verdict: Phase III juries are free to hold defendants liable for conduct that the Phase I

jury may never have considered unlawful, much less punishable. See Blyden v. Mancusi, 186 F.3d 252, 257, 268-69 (2d Cir. 1999); Henley v. FMC Corp., 2001 WL 733110, at *8 (4th Cir. June 29, 2001).[1] In that respect, the trial plan also violates defendants' jury-trial right under the Florida Constitution, which is commensurate with the jury-trial right under the U.S. Constitution.[2]

The only "alternative" to re-examination is equally improper: an irrebuttable presumption that the Phase I jury found unlawful all of defendants' conduct over nearly half a century. See Agency for Health Care, 678 So. 2d at 1254 (irrebuttable presumption of liability element is unconstitutional). That was the "solution" reached in the first (and so far, only) purported "Phase III trial," Lukacs v. Brown & Williamson Tobacco Corp., No. 01-03822 (Fla. 11th Jud. Cir. 2001). (The Lukacs plaintiffs have filed an amicus brief supporting plaintiffs here.) Mr. Lukacs claimed reliance on two or three advertisements in the 1940s and 50s, but he offered no proof of their falsity or fraudulent intent. Instead, he asserted that such matters were fully established by the Engle Phase I verdict. The Lukacs trial judge reviewed that verdict and asked: "What's the false statement [found in Engle]?" When the judge was informed that no one can answer that question, she declared as "law of the case" that all "cigarette advertising is false and misleading." (RA3:36, at 2009-14, 2279-84, 2308-09.) That absurd and fundamentally unfair result is the consequence of attempting to apply the Phase I

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[1] See also Rowlands v. Signal Constr. Co., 549 So. 2d 1380, 1383 (Fla. 1989); Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978). Defendants unsuccessfully sought the necessary specificity in the Phase I verdict form. (R215:49493-532, RA1:14; R304:69349-60, RA1:15; T35915-16, 35952-54, 35967-71, 36298-300.)

[2] See In re Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433, 434-35 (Fla. 1986); Castano, 84 F.3d at 750-51; In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995).

verdict to any Phase III issue. The Phase I verdict cannot be salvaged for any purpose.[3]

* * *

VII. Numerous Other Errors Not Addressed By The Third District Also Required Reversal

The Third District did not address numerous other issues raised on appeal, each of which also required reversal. For example, the trial court improperly allowed plaintiffs to assert claims preempted by federal law. (RA3:28, at 132-43; RA3:30, at 75-79.) The trial court also improperly allowed the jury to impose liability and punishment for conduct protected by the First Amendment and the Noerr-Pennington doctrine. (RA3:28, at 125-31, 143-49; RA3:30, at 79-80.) These and other errors provide additional, alternative grounds for approval of the Third District's ruling (or would require further proceedings upon remand).[35]

[35] Other issues raised on appeal but not addressed by the Third District included: (1) the trial court improperly entered a "final judgment" even though judicial labor was incomplete (Phase III had not even begun); (2) the Phase I jury instruction on "materiality" was defective; (3) the Phase I jury instruction on "scientific causation" was defective; (4) the Phase I verdict form question concerning "fraudulent concealment" was defective; (5) the trial court's failure to dismiss the "emotional distress" claim was erroneous; (6) the trial court's admission of privileged documents was erroneous; (7) plaintiffs' counsel improperly referred to defendants' non-party affiliates as potential sources of payment; and (8) the trial court erroneously failed to instruct the jury on a class cut-off date and on the need to avoid punishing lawful conduct. (RA3:28, at 53-55, 69-86, 104-06, 125-31, 141-49; RA3:30, at 33-34, 41-49, 64-65, 70-73.

[3] In addition, improper class certification, attorney misconduct, and other errors taint the Phase I verdict (and thus the Phase II-A and II-B verdicts as well).

APPENDIX L

**Reply Brief of Petitioners,
Florida Engle Class, On The Merits,
No. SC03-1856 (Fla. filed Aug. 16, 2004)
(Excerpt, p. 7 n.3) (emphasis in original)**

The verdict form was not a basis for reversal and is not reviewable here. Provident Management Corp. v. City of Treasure Island, 718 So. 2d 738, 740 (Fla. 1998). Defendants challenge the "generalized" question on entitlement to punitive damages but fail to reveal that Tobacco authored and defended that question: "That's not a meaningless question. . . [I]f the answer is no, not a single Florida . . . injured smoker in this Class can ever recover punitive damages from any of the defendants in this courtroom." T.36004-05; 36012-13. Defendants agreed to the verdict form with 242 subparts as a preferred "middle ground" over Class' interrogatory questions on fraud and conspiracy T.35950-51; 35967-69; A.6 pp. 110-120.

APPENDIX M

RESPONDENTS' MOTION FOR REHEARING, No. SC03-1856 (Fla., filed Aug. 7, 2006) (Excerpt)

III. Unresolved Appellate Issues Remain To Be Addressed By The Third District (And Potentially By This Court)

Defendants raised numerous issues on appeal that were left unresolved by the Third District because that court reversed the judgment on other grounds. (See Defendants' Merits Brief at 49-50 & n.35; id. Appendix Vol. 3, Tab 28, at 53-55, 69-86, 104-06, 125-49; id. Appendix Vol. 3, Tab 30, at 33-34, 41-49, 64-65, 70-73, 75-80.) Those issues stand as independent reasons why the preserved Phase I findings cannot be applied (and, in addition, why judgment cannot be entered for Farnan and Della Vecchia). Defendants submit that the Court may have overlooked or misapprehended those issues. For example, defendants argued in the Third District that the trial violated federal preemption, which, among other things, forecloses the possibility of interpreting the "defect" findings as meaning that all cigarettes are defective. Defendants ask the Court to clarify that on remand the Third District may consider and decide all remaining unresolved issues.[1] Alternatively, if this Court has itself considered and

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[1] See, e.g., Commission on Ethics v. Barker, 677 So. 2d 254, 257 (Fla. 1996) ("we remand the case for the determination of [an unadressed issue]"); State v. Nordstrom, 613 So. 2d 437, 441 (Fla. 1993) (remanding to the district court "with directions to consider the other issues raised in the initial appeal"); see also Rosen v. FIGA, 802 So. 2d 291, 295 n.6, 298 (Fla. 2001) ("On remand, any issues previously raised by the parties before the First District but left unresolved by our decision may be addressed"); Lexington Insurance Co. v. Simkins, 704 So. 2d 1384, 1386 (Fla. 1998) ("On remand, any issues previously raised but left unresolved can be addressed"); Provident Management Corp. v. City of Treasure Island, 718 So. 2d 738, 740 (Fla. 1998) ("On re-

rejected defendants' arguments on those issues, defendants respectfully ask the Court to state that it has done so.

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mand, any issues previously raised but left unresolved can be addressed").

APPENDIX N

Certain Defendants' Motion Regarding Proceedings On Remand, No. 3D00-3400 (Fla. App. 3 Dist. filed Jan. 12, 2007) (Excerpt)

Previously Unaddressed Issues Must Now Be Decided As A Result Of The Florida Supreme Court's Opinion.

4. The additional points of error raised but not yet addressed in this Court are independent grounds for reversing the judgment in its entirety, and they remain unaffected by the Supreme Court's decision. As shown by the examples provided below, if those points of error are correct, then the Farnan and Della Vecchia awards may not be reinstated and the Phase I findings may not be accorded any "res judicata effect."

5. For instance, this Court has not yet ruled on defendants' arguments that the trial court misapplied federal law (preemption and the First Amendment) throughout this case, and that the trial court violated Florida law in framing jury instructions and verdict form questions on "causation," "materiality," and "concealment" – errors that invalidate the Farnan and Della Vecchia awards and the Phase I findings. Nor has this Court yet ruled on defendants' argument that the trial court incorrectly failed to dismiss the claim of intentional infliction of emotional distress – an additional error that invalidates the Farnan and Della Vecchia awards.[1] (See Combined Initial Brief at 69-86, 132-49; Consolidated Answer Brief at 134-49, 233-46; Combined Reply Brief at 40-49, 75-8.

[1] The Supreme Court ruled that the Phase I findings as to intentional infliction of emotional distress could not be applied in any individual actions by class members under principles of res judicata. Slip op. at 4. However, the Supreme Court did not address whether the emotional distress claim should have been dismissed as to plaintiffs Farnan and Della Vecchia under principles of substantive Florida tort law.